Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

STEPHEN G. SULTENFUSS,

Petitioner,

vs.

WAYNE SNOW, JR., JAMES T. MORRIS, MOBLEY HOWELL, MICHAEL H. WING, BETTYE O. HUTCHINGS, and MICHAEL J. BOWERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, when the State of Georgia replaced its parole statute, which formerly gave unfettered discretion to the Parole Board, with a statute mandating the adoption and maintenance of a parole guidelines system requiring the application of specified substantive criteria to be used in determining all parole action, the State created procedural due process rights in that system.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner Stephen G. Sultenfuss and the respondents, Wayne Snow, Jr., (former) Chairman of the Georgia State Board of Pardons and Paroles, James T. Morris and Bettye O. Hutchings, members of the Georgia State Board of Pardons and Paroles, Mobley Howell and Michael H. Wing, (former) members of the Georgia State Board of Pardons and Paroles, and Michael J. Bowers, Attorney General of the State of Georgia.

Timothy E. Jones, Wayne Garner, Jr., and Bobby K. Whitworth are current members of the Georgia State Board of Pardons and Paroles who were not members when the proceedings below were initiated.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Stephen G. Sultenfuss respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, on rehearing en banc, entered in the above-entitled proceeding on October 5, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit on rehearing en banc is reported at *Sultenfuss v. Snow,* 35 F.3d 1494 (11th Cir. 1994) (App. 1).

The opinion of the panel of the Eleventh Circuit is reported at *Sultenfuss v. Snow,* 7 F.3d 1543 (11th Cir. 1993)

(App. 59), *vacated and reh'g en banc granted*, 14 F.3d 572 (11th Cir. 1994) (App. 57).

The decision of the United States District Court for the Northern District of Georgia (G. Ernest Tidwell, J.) (N.D. Ga. Nov. 30, 1990) (App. 86) has not been reported.

A prior decision of the district court dismissing the action (Aug. 11, 1988) (App. 92) has not been reported. That decision was affirmed in part and reversed in part by the court of appeals in its opinion reported at *Sultenfuss v. Snow*, 894 F.2d 1277 (11th Cir. 1990) (App. 80).

JURISDICTION

Petitioner Stephen G. Sultenfuss brought this action in the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 1983.[1] On August 14, 1990, the district court granted the respondents' motion for summary judgment. On November 3, 1993, the United States Court of Appeals for the Eleventh Circuit reversed the district court's grant of summary judgment. On February 4, 1994, the court of appeals vacated the panel opinion and granted rehearing en banc.

The judgment of the Eleventh Circuit, on rehearing en banc, was entered on October 5, 1994, affirming summary judgment in favor of the respondents. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Mr. Sultenfuss filed this suit along with five other inmate plaintiffs, Michael C. Bishop, Donald K. Damron, Leland Davidson, Larry Kelley, and Charles McMulling. The district court *sua sponte* dismissed the action pursuant to 28 U.S.C. § 1915(d). Only Mr. Sultenfuss appealed. The court of appeals affirmed in part and reversed in part, remanding Mr. Sultenfuss' remaining claims to the district court. *Sultenfuss v. Snow*, 894 F.2d 1277 (11th Cir. 1990) (App. 80).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const., Amend. XIV:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

O.C.G.A. § 42-9-40

> (a) The board shall adopt, implement, and maintain a parole guidelines system for determining parole action. The guidelines system shall be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system shall be consistent with the board's primary goal of protecting society and shall take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.
>
> (b) The guidelines system required by subsection (a) of this Code section shall be adopted by rules or regulations of the board. The rules or regulations

shall be adopted in conformity with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

O.C.G.A. § 42-9-42(c)

. . . No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society. Furthermore, no person shall be released on pardon or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge. . . .

Ga. Comp. R. and Regs. 475-3-.05(5)

(5) In considering parole for persons who will become statutorily eligible for parole consideration and who are serving less than a life sentence, the Board shall review a recommendation as to months to serve. This recommendation will be obtained from the Parole Decision Guidelines system which accounts for the severity of the crime and the inmate's likelihood of success on parole. The inmate's likelihood of success on parole is measured by weighted factors concerning the inmate's criminal and social history which the Board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision. The Parole Decision Guidelines System is an aid to the Board in making more consistent, soundly based and explainable parole decisions and does not create a liberty interest. The Board specifically reserves the right to exercise its discretion under Georgia Law to disagree with the recommendations resulting from application of the Parole Decision Guidelines and may make an independent decision to deny parole or establish a Tentative Parole Month at any time

> prior to sentence expiration. After the Board notifies the inmate of their decision, the inmate may contest either the Crime Severity Level or Parole Success Factor scores by writing within 30 days the Parole Guidelines Director in the Board's Central Office. Prior to an inmate being paroled the inmate's institutional conduct will be reviewed and institutional misconduct may result in a delay in parole release or a decision to deny parole. Any decision rendered under the Parole Decision Guidelines may be changed at the discretion of the Board at any time. The Board may modify any part of the Parole Decision Guidelines system at any time.

Georgia Parole Decision Guidelines System (App. 95-114).

STATEMENT OF THE CASE

Statement of Facts

Petitioner Stephen G. Sultenfuss was incarcerated at Central Correctional Institution in Macon, Georgia, under concurrent sentences for possession of cocaine running from August of 1986.

Applying the Georgia Parole Decision Guidelines, adopted by the Parole Board pursuant to O.C.G.A. § 42-9-40, which provides that the Guidelines "shall be used in determining parole actions on all inmates," the Parole Board assigned Mr. Sultenfuss a Parole Success Likelihood Score of 11, good, and a Crime Severity Level of II, low. The intersection of Mr. Sultenfuss' Crime Severity Level and Parole Success Likelihood Score on the Parole Decision Guidelines Grid indicated that Mr. Sultenfuss should serve ten months before release, which should have yielded a Tentative Parole Month of June, 1987.

The Tentative Parole Month is the month "during which the offender may expect to be released. . . . "[2] The Guidelines provide that the Tentative Parole Month "shall be calculated

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[2] Parole Decision Guidelines System ¶ 8-27.01 (App. 107).

by adding the recommended months-to-serve from the Guidelines Grid to the compute-from date of the controlling sentence."[3] The Board nevertheless departed from the Guidelines Grid and assigned Mr. Sultenfuss 62 months of incarceration before parole, an increase of four and one-half years, yielding a Tentative Parole Month of January, 1992.

In deciding to depart from the Guidelines Grid by more than four years, the Board considered the fact that Mr. Sultenfuss was convicted while on parole for another offense. However, the Parole Guidelines applied to Mr. Sultenfuss already specifically accounted for such circumstances. The Guidelines provide that an offender whose parole has been revoked will be assigned the Crime Severity Level corresponding with the offense of the greatest severity.

Mr. Sultenfuss' parole file, upon which the Board's decision was based, incorrectly showed that he had been convicted of possession with intent to distribute, rather than simple possession, of cocaine. Although Mr. Sultenfuss had been charged with possession and possession with intent to distribute, the jury *convicted* Mr. Sultenfuss *only* of the possession charge, *acquitting* him of the intent to distribute charge.[4]

Mr. Sultenfuss' parole file also included a rating summary sheet falsely stating that Mr. Sultenfuss was "a major drug dealer of cocaine in Macon for years." The Parole Guidelines provide, however, that the Crime Severity Level shall be determined "based on actual convictions of record, without reference to original arrest or booking charges, or allegations in accusations or indictments for which an actual conviction was not obtained."[5]

Mr. Sultenfuss received notice of the Parole Board's departure from the Guidelines, giving him 30 days within which to contest his Parole Success Likelihood Score and/or

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[3] *Id.*

[4] In their motion for summary judgment in this case, respondents relied upon the incorrect sentence for possession with intent to distribute.

[5] Parole Decision Guidelines System ¶ 8-12.01 (App. 99).

his Crime Severity Level. Mr. Sultenfuss did not contest these scores because he did not disagree with them or with the Guidelines Grid determination of ten months to serve. Under the Georgia parole system, however, inmates are given no opportunity to respond to or contest the Board's *departure* from the Guidelines in setting a Tentative Parole Month.[6] Moreover, until discovery in this case, Mr. Sultenfuss was not told about the erroneous information that the Board contended supported its departure from the Guidelines.

On July 15, 1988, Mr. Sultenfuss and several other inmates filed a *pro se* complaint under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Georgia, claiming, *inter alia*, that the members of the Parole Board had violated the inmates' rights to procedural due process in departing from the Parole Decision Guidelines Grid in setting parole release dates without affording a meaningful opportunity to contest those departures. The district court *sua sponte* dismissed the complaint as frivolous under 28 U.S.C. § 1915(d).

Mr. Sultenfuss was the only inmate to appeal the district court's dismissal. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of the claim for compensatory damages, but reversed dismissal of the due process claim. *Sultenfuss v. Snow*, 894 F.2d 1277 (11th Cir. 1990) (*per curiam*). The court of appeals remanded the case to the district court for further proceedings.

Proceedings Below

On August 14, 1990, the respondents filed a motion for summary judgment. Concluding that the Georgia parole guidelines system adopted in 1980 creates no liberty interest in parole protected by procedural due process, the district court granted the Board's motion for summary judgment.

Reversing the district court's grant of summary judgment, the panel of the court of appeals held that the current Georgia parole system creates a liberty interest protected by

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[6] *See* Ga. Comp. R. and Regs. 475-3-.05(5).

the due process clause. *Sultenfuss v. Snow*, 7 F.3d 1543 (11th Cir. 1993), *vacated and reh'g en banc granted*, 14 F.3d 572 (11th Cir. 1994). The panel concluded that "the mandatory language of the statute and the Guidelines, combined with the particularized standards that guide the Board's parole determinations, create a liberty interest in parole release in Georgia." 7 F.3d at 1550-51.

On February 4, 1994, the court of appeals vacated the panel opinion and granted rehearing en banc. On rehearing, a six-member majority of the court of appeals affirmed the district court's grant of summary judgment against Mr. Sultenfuss, holding that the Georgia parole system does not create a liberty interest in parole. One judge dissented from the majority opinion on the ground that the court of appeals should have certified to the Georgia Supreme Court unsettled questions of state law which he felt controlled the disposition of the case. Four judges dissented from the majority opinion, concluding that under controlling precedent of this Court, the Georgia parole system creates a liberty interest in parole subject to the Due Process Clause of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

In 1980, in response to public scrutiny and widespread criticism of the arbitrary and inconsistent nature of parole decisions, the Georgia legislature passed a statute changing Georgia's parole scheme from one that was entirely discretionary with the Parole Board to one mandating the implementation of a parole guidelines system, mandating specific criteria that the system must take into consideration, and mandating that the system be used in determining parole action on all eligible inmates. A majority of the en banc court of appeals held, inexplicably, that a Georgia administrative agency (the Parole Board) can ignore that controlling statute passed by the Georgia legislature and deny Georgia prisoners even the most basic due process protection from inconsistent, arbitrary, erroneous, or discriminatory parole decisions. The

six-member majority erroneously deferred to the Parole Board's purported reservation of unfettered discretion to itself to ignore the legislatively mandated Parole Guidelines for any reason or for no reason at all, contrary to the history, purpose, and the mandates of the Georgia parole guidelines statute.

In reaching its conclusions, the majority of the court of appeals failed to follow controlling precedent of this Court. This Court has held that a state by legislative action may create due process rights in its parole system. A state does not have to establish a parole system; when it does, it may elect to provide for due process protection or to leave parole to the unguided discretion of the paroling authority. This Court has unequivocally held, however, that "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest" invoking due process rights in parole. *Hewitt v. Helms*, 459 U.S. 460 (1983).

A comparison of the state parole systems at issue in this Court's seminal cases of *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987), with the Georgia parole system demonstrates that under *Greenholtz* and *Allen*, the Georgia system necessarily creates a liberty interest in parole.

This case affects thousands of Georgia prisoners eligible for release on parole. In addition, under this Court's precedent, every time a state legislates or adopts a rule or regulation on an issue involving the interests of prison inmates, it has the potential of creating an "expectation" subject to due process. State law or rule-making bodies clearly have an interest in knowing in advance how and when such constitutionally protected interests are created so that such interests will not be created or fail to be created unintentionally. For these reasons, the Eleventh Circuit must not be permitted to ignore *Allen* and *Greenholtz*.

II. THE OUTCOME OF THIS CASE WILL NOT ONLY AFFECT THOUSANDS OF GEORGIA PRISONERS, BUT HAS FAR-REACHING IMPLICATIONS FOR ALL STATES' LEGISLATIVELY CREATED LIBERTY INTERESTS.

A. The History and Purpose of the Georgia Parole Statute Demonstrate That The Georgia Legislature's Intent Was To Create A Liberty Interest In Parole According To The Georgia Parole Guidelines.

The Board's actions in Mr. Sultenfuss' case, and its corresponding interpretation of the Georgia parole system, are completely at odds with the history and purpose of the 1980 change in the Georgia law governing parole decisions. In 1978, a federal investigation disclosed widespread corruption in the Tennessee parole system, involving bribery of officials in the governor's office for influencing the granting of pardons and paroles. Following extensive coverage of the investigation in the national news, "the institution of parole came 'under siege.' "[7] As the nationwide debate raged over whether parole should be abolished all together or whether stricter standards should be placed on the way parole boards operated, in 1979, the Georgia Parole Board was widely criticized for a number of its decisions.[8] A grand jury investigation of the Board's actions led to a state court ruling that certain Board proceedings were unconstitutional. In particular, the state court held that the Board must cease its practice of conducting secret proceedings.[9]

It was in this environment that the Georgia legislature discarded the State's old parole statute which charged the

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[7] *Sultenfuss v. Snow*, 35 F.3d 1494, 1513 (11th Cir. 1994) (Clark, J., dissenting) (quoting Marie F. Ragghianti, *Is Parole Still a Workable Concept*, N.Y. Times, April 4, 1986, at A31) (App. 50).

[8] *See* 35 F.3d at 1513 (App. 49-50) and articles cited therein.

[9] *Id.* (citing *Board Stripped of Shroud of Secrecy, Extensive Effect Likely In Ruling on Parole Panel*, Atlanta Constitution, March 23, 1980, at B11) (App. 50-51).

Parole Board, solely and in its unfettered discretion, "with the duty of determining which inmates . . . may be released on pardon and parole and fixing the time and conditions thereof."[10] The new parole statute, adopted in 1980, curtailed the Parole Board's discretion and provided as follows:

> (a) The [parole] board shall adopt, implement, and maintain a parole guidelines system for determining parole action. The guidelines system shall be used in determining parole actions on all inmates, except those serving life sentences. . . . The system shall be consistent with the board's primary goal of protecting society and shall take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.
>
> (b) The guidelines system required by subsection (a) of this Code section shall be adopted by rules or regulations of the board. The rules or regulations shall be adopted in conformity with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."[11]

The new system was hailed as a "scientific approach" to parole decisions:

> "Gov. George Busbee announced Thursday that a new 'scientific approach' will be implemented to help determine whether inmates in Georgia prisons ought to be paroled, thus avoiding the controversy that surrounded such paroles as the recent release of convicted kidnapper Gary Steven Krist.

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[10] O.C.G.A. § 42-9-20 (repealed). *See also Sultenfuss v. Snow*, 7 F.3d 1543, 1550 (11th Cir. 1993) ("[P]rior to 1980, the Georgia statutes did not place limits on the Board's discretion to determine when an eligible inmate was to be released on parole.") (App. 75).

[11] O.C.G.A. § 42-9-40.

> " 'No longer' said Busbee, 'will the parole board's decision-making process be a myth to the public. . . . The (new) parole rating guidelines will bring the Pardons and Paroles Board into the 20th Century.'
>
> * * *
>
> " 'The parole rating guidelines will fulfill two critical needs in the criminal justice system,' said the governor. 'It will bring about greater fairness, consistency and openness in the parole decision-making process and will allow us to expand the use of paroles as an alternative to incarceration.'
>
> * * *
>
> " 'The new program will involve 'the careful development of two charts as grids,' Busbee explained. 'One chart – the crime severity index – will rank in fine detail the seriousness or severity of each category of crime as determined by input from board members. The second chart takes into account social factors, including work history and criminal history, which serve as indicators of the offender's chance for success on parole,' he said.
>
> * * *
>
> " 'Once in place, the criteria used in making decisions will be available for public review, the governor said. This will increase 'the credibility of the system,' he said."[12]

The Parole Board itself publicly embraced the legislative mandate for a comprehensive parole guidelines system:

> To repair its image, the board set about codifying its parole procedures. Reviews of past cases had revealed wide disparities in the board's decisions. "We were not the most consistent people in making

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[12] 35 F.3d at 1514 (quoting Beau Cutts, *"Scientific" Parole Plan Aired*, Atlanta Constitution, May 18, 1979, at C1, C4) (App. 51-52).

> decisions," [board director] Morris said. "As we looked at cases we would find that, for example, a person serving for an offense would be paroled. Four months later, a person serving for the same offense with the same background would not be paroled."
>
> To deal with charges of capriciousness, the board and its staff . . . began developing a new way of dealing with the cases. Advertised as a "scientific" way of managing parole, the plan took effect in January.[13]

The Board further embraced the goals of the legislature in the Guidelines which the Board formulated pursuant to the statutory mandate:

> The Parole Decision Guideline System shall be utilized to promote the following policy goals of the Board:
>
> (a) Objective and equitable use of the clemency power in determining appropriate lengths of imprisonment for individual inmates;
>
> (b) Equitable and consistent terms of imprisonment for all inmates sharing similar personal behavior histories and convictions for similar crimes . . . . [14]

B. The Parole Board's Actions Are Contrary To The Intent, Purpose and Mandate Of The Georgia Parole Statute.

Notwithstanding the clear mandate of the statute and the evils it was intended to correct – as publicly expressed by Georgia's governor and embraced by the Parole Board itself – the Board, now endorsed by a bare majority of the Eleventh Circuit, continues to have absolute, unfettered discretion in

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[13] *Id.* (quoting Chester Goolrick, *Either Way, Potts Decision Likely to Stir Controversy*, Atlanta Constitution, April 30, 1980, at C1, C2.) (App. 52-53).

[14] Parole Decision Guidelines System ¶ 8-1.02 (App. 95).

making parole decisions. As exemplified by Mr. Sultenfuss' case, the Board applies the Guidelines system to each inmate and then arbitrarily departs from the Guidelines Grid without following any procedures mandated by the statute or affording any opportunity to the inmate to appeal or contest the departure.[15] Such departures occur in 80 percent of parole decisions.[16] The Board's policy of frequent, arbitrary departures has undermined and rendered meaningless the legislative mandate that the Board implement the Guidelines system and use that system in determining parole actions on all eligible inmates.

The majority of the court of appeals concluded that the Board's position is not inconsistent with this statutory mandate because "[t]he Board's decision to depart from the grid recommendation does not mean that the Guidelines were not *used* in determining parole action." 35 F.3d at 1501 (emphasis added). This conclusion is sheer sophistry. If the Board is free to discard the Guidelines for any reason or for no reason at all, without notice or response from the inmate, the Guidelines are not "used in determining parole actions" as mandated by the statute. The Board's position is therefore "nothing more than a cavalier attempt to avoid the mandate of the Georgia legislature."[17]

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[15] *See infra* pp. 28-29.

[16] *See infra* at 15 n.20.

[17] 35 F.3d at 1515 (Clark, J., dissenting). Judge Clark noted, "[t]his purported retention of discretion is not the only cavalier response the Board has had to the legislature's mandate." *Id.* Despite O.C.G.A. § 42-9-40(b)'s requirement that the guideline system be adopted by rules or regulations of the Board and that the rules or regulations be adopted in conformity with the Georgia Administrative Procedure Act, the Board has failed to comply with the Georgia Administrative Procedure Act by failing to make the Guidelines available to the public as mandated by that law. Indeed, in this case, the Board took the position that the Guidelines are part of an "internal operating manual" that was not available to the court of appeals for review. *See id.* Thus, "[b]y failing to make the Guidelines available to the public as mandated by law, the Board does nothing to dispel the stereotype of the parole board as a shadowy body making arbitrary and capricious decisions outside the realm of public scrutiny." *Id.*

C. This Case Directly Affects Thousands of Georgia Prisoners and Indirectly Affects Prisoners In Other States.

The massive impact of the majority's opinion that the Parole Board has unfettered discretion free of any constraints of due process cannot be denied.[18] Until recently, the Board departed upward from the Parole Guidelines in only about 25 percent of the cases.[19] The Board has now begun departing upward in over 80 percent of cases.[20] These decisions apparently are not based on the circumstances of any individual inmate's case, but are in response to political pressures to keep criminals in prison longer[21] combined with the temporary availability of new prison bed space:

> "In many cases we're 'maxing' these people out," [Parole Board spokesman Mike] Light said. "They're serving 100 percent of their sentences. Inmates are serving more than what the (grid) recommends because of more bed space."[22]

Newspaper articles have reported "the board's recent decision to rescind parole dates for inmates with spotless prison records and for those who had already begun working

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[18] Newspapers report that as many as 7,000 Georgia inmates could be affected by the outcome of this case. *See, e.g.*, Bill Rankin and Rhonda Cook, *Suit Could Lead to Release of 7,000 Inmates*, Atlanta Journal and Constitution, June 9, 1994, at B1.

[19] *See id.*

[20] Eric Velasco, *Ga. System of Parole Under Fire*, Macon Telegraph, May 9, 1994, at 1A, 5A. ("The parole board goes above the grid about 80 percent of the time, [Parole Board Spokesman Mike] Light said.").

[21] *See* Rhonda Cook, *Thrown Back in Prison*, Atlanta Constitution, May 23, 1994, at A1 ("[T]he parole board . . . decided to begin implementing some of [the] tougher sentencing measures [of the governor's anti-crime package] long before the vote [on the package] takes place.") (App. 119).

[22] Eric Velasco, *Ga. System of Parole Under Fire*, Macon Telegraph, May 9, 1994, at 1A, 5A.

jobs outside of prison and were living at halfway houses,"[23] with no opportunity to appeal the decisions:

> Lillian Dean killed her husband in June 1984. He was threatening to shoot her, and they were struggling over a gun when she shot him.
>
> Her sentence was scheduled to end in April after six years in prison and four years in a halfway house. The 54-year-old grandmother's prison behavior was exceptional, and for the past two years she has paid part of her living expenses from her earnings as a motel housekeeper.
>
> But weeks before she expected to be set free, the state Board of Pardons and Paroles told Dean she would have to give up her job. It was returning her to prison until 2004, about the time she qualifies for Social Security. The added prison time for Dean will cost Georgia Taxpayers about $400,000.
>
> * * *
>
> Already, about 50 men and women have been moved out of halfway houses and back to prison, and scores more soon will be told they will remain in prison longer than they expected. Those inmates include non-violent forgers and shoplifters, as well as abused women who killed men who beat them.
>
> Besides delaying inmates' release, the board also is telling them that taking prison-sponsored educational and vocational classes won't improve their chances of parole, despite a 1992 law that tied the classroom credits to clemency.
>
> "Things have sort of changed over here," said Wayne Garner, one of the board's five members.

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[23] Rhonda Cook, *Prisoners Refuse to Work in Protest of Parole Policy*, Atlanta Journal and Constitution, June 1, 1994, at C3.

> "This is a very bold thing, and it's going to cause a lot of heartache."[24]

In sum, "the recent change in attitude of the Parole Board . . . has resulted in about 50 percent of the inmates serving more time in prison."[25]

In his dissent, Judge Carnes noted that:

> [T]he public importance of [these] questions transcends the result in this one case. . . . [T]he decision in this case will determine when scores, if not hundreds, of other Georgia prison inmates will be released. The operation of the Georgia prison system – including the determination of which inmates will be released on parole and when – is a matter of utmost importance to the State of Georgia and all of its people.

35 F.3d at 1505 (Carnes, J., dissenting).[26]

Moreover, the question of when and how a state statute or regulation will be deemed to have created a liberty interest is of concern to legislative and rule-making bodies and their constituents in all states. At this vital intersection of state and

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[24] Rhonda Cook, *Thrown Back in Prison*, Atlanta Constitution, May 23, 1994, at A1 (App. 118-119).

[25] Rhonda Cook, *Experts: Crime Fight May Be Too Costly, Long Jail Stays Can Run Into Millions*, Atlanta Journal and Constitution, February 14, 1994, at A1.

[26] The fact that the court of appeals granted rehearing en banc (in a case in which uniformity of panel decisions was not a concern) underscores the importance of the issues raised herein not only to the State of Georgia, but to the federal courts and other states. Federal Rule of Appellate Procedure 35 provides that rehearing en banc "is not favored and ordinarily will not be ordered except . . . when the proceeding involves a question of exceptional importance." *Id.*

As Judge Carnes also observed in his dissent, upon rehearing en banc, with a majority opinion garnering six votes and five dissents, the court of appeals "is sharply divided" over the questions raised by this appeal. 35 F.3d at 1504 (Carnes, J., dissenting). This Court has often noted the closeness of a court of appeals' en banc vote on a question of "exceptional importance" in reviewing such cases. *See, e.g., Oil Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 412 (1976) (reviewing an 8-6 en banc decision); *Miree v. DeKalb County*, 433 U.S. 25 (1977) (reviewing an 8-6 en banc decision); *Rinaldi v. United States*, 434 U.S. 22 (1977) (reviewing a 7-6 en banc decision).

federal constitutional law, precedent must be clear so that state bodies can act accordingly.[27]

III. THE MAJORITY'S OPINION IS CONTRARY TO BINDING SUPREME COURT PRECEDENT SET FORTH IN *GREENHOLTZ* AND *ALLEN*.

This Court has unequivocally held that when a state parole system creates a legitimate "expectation" of release on parole, an inmate has a liberty interest protected by procedural due process. *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). A state creates a protected liberty interest "by placing substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). In *Kentucky Dep't of Corrections v. Thompson*, this Court recently summarized the law "regarding the creation of a liberty interest in the prison setting":

> In sum, the use of "explicitly mandatory language," in connection with the establishment of "specified substantive predicates" to limit discretion, forces a conclusion that the State has created a liberty interest.

490 U.S. 454, 463 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). The "substantive predicates" necessary to create a liberty interest have been described as " 'particularized standards or criteria [that] guide the State's decisionmakers.' " *Olim*, 461 U.S. at 249 (quoting *Connecticut Bd. of*

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[27] Since *Greenholtz*, a number of other parole systems have been found by the federal courts of appeals to invoke due process. *See, e.g., Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992) (Wisconsin statute); *Bermudez v. Duenas*, 936 F.2d 1064 (9th Cir. 1991) (Guam statute); *Dace v. Mickelson*, 797 F.2d 574, 577 (8th Cir. 1986) (South Dakota statute); *Green v. Black*, 755 F.2d 687, 688 (8th Cir. 1985) (Missouri policy statement); *Mayes v. Trammell*, 751 F.2d 175, 178 (6th Cir. 1984) (Tennessee rule); *Parker v. Corrothers*, 750 F.2d 653, 661 (8th Cir. 1984) (Arkansas regulation); *United States ex rel Scott v. Illinois Parole and Pardon Board*, 669 F.2d 1185, 1188 (7th Cir. 1982) (Illinois statute), *cert. denied*, 459 U.S. 1048 (1982); *Williams v. Missouri Bd. of Probation & Parole*, 661 F.2d 697, 698 (8th Cir. 1981) (Missouri statute), *cert. denied*, 455 U.S. 993 (1982); *Winsett v. McGinnes*, 617 F.2d 996, 1007 (3d Cir. 1980) (Delaware regulations), *cert. denied*, 449 U.S. 1093 (1981).

Pardons v. Dumschat, 452 U.S. 458 (1981) (Brennan, J., concurring)). The "explicitly mandatory language" must "direct[ ] the decision maker to follow certain procedures" in applying the particularized criteria or otherwise limit the decision maker's discretion. *Sultenfuss v. Snow*, 35 F.3d at 1502 (citing *Thompson*, 490 U.S. at 462).

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), is the seminal case on liberty interests in parole. The Nebraska parole statute at issue in *Greenholtz* provided, in pertinent part:

> "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for the law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date."

442 U.S. at 11 (quoting Neb. Rev. Stat. § 83-1, 114(1) (1976)).

The statute further provided a list of 15 factors that the Board was obligated to consider in reaching a parole decision. Factor number 15 was a catch-all giving the Board the discretion to base its decision on "any other factors the Board determines to be relevant." *Id.* at 18. This Court found that this statute gave rise to an "expectation of release" protected by procedural due process. *Id.* at 12.

This Court again concluded that a liberty interest in parole had been created in *Board of Pardons v. Allen*, 482

U.S. 369 (1987). The Montana parole statute at issue in *Allen* provided:

> Prisoners eligible for parole. (1) Subject to the following restrictions, the board *shall* release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]
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> * * *
>
> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

482 U.S. at 376-77 (quoting Mont. Code Ann. § 46-23-201 (1985)) (alterations in original). Relying on the use of "mandatory language" combined with "substantive predicates," this Court concluded that the Montana statute, like the statute at issue in *Greenholtz*, created a liberty interest in parole. As further support for its conclusion, this Court cited to the legislative history of the statute, which replaced a statute that had vested absolute discretion in the Parole Board. This Court saw the change in the law as an "indication of a legislative intent to cabin the discretion of the Board," resulting in the creation of a liberty interest. *Id.* at 381.

A. The Georgia Parole System Creates A Liberty Interest Under *Greenholtz* and *Allen* By Mandating The Implementation Of Parole Guidelines Requiring That Specific Substantive Criteria Shall Be Used In Determining Parole Action On All Inmates.

As the four-member dissent in *Sultenfuss* put it, "[i]t is inconceivable that the Nebraska and Montana statutes at issue in *Greenholtz* and *Allen* create a liberty interest in parole while the Georgia parole scheme does not." 35 F.3d at 1508.

The Georgia statute mandates implementation of a parole guidelines system ("The board *shall* adopt, implement and maintain a parole guidelines system for determining parole action."), mandates the use of that system in making parole decisions ("The guidelines system *shall be used* in determining parole actions on all inmates . . . . "), and mandates the criteria that the system must apply ("The system . . . *shall* take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision."). O.C.G.A. § 42-9-40(a) (emphasis added).

That the Georgia parole system is comprised both of a statute and rules adopted pursuant thereto by an administrative agency is of no consequence.[28] The criteria that guide the Board's decision-making are no less particularized under the Georgia system than under the Nebraska or Montana systems. Here, the Board must follow a step-by-step procedure spelled out by the Guidelines for the application of the specific criteria mandated by the statute. The Board must assign each inmate a numerical Crime Severity Level between I and VIII by reference to a table listing dozens of specific crimes. Then the Board must assign a Parole Success Likelihood Score, adding together numerical values for each of eight specific factors, designed to predict parole success or failure, to reach a score between zero and 20.[29] The Guidelines then require

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[28] It is well-established that regulations alone can create a liberty interest invoking procedural due process. *See, e.g., Thompson*, 490 U.S. at 461.

[29] This score is calculated based on the following factors which the Board must consider:

(a) Age at First Commitment;
(b) Prior Juvenile and Adult Convictions;
(c) Prior Incarcerations Since Age 17;
(d) Probation/Parole Failure;
(e) Use, Possession, or Attempt to Obtain Heroin or Opiate Drugs;
(f) Commitment Offense Involved Burglary or Forgery;
(g) Fully Employed During the Six Months Prior to Current Offense.

Parole Decision Guidelines System ¶ 8-17.03 (App. 102-103).

that the Crime Severity Level and the Parole Success Likelihood Score "*shall* be used in conjunction . . . finally to determine a recommended number of months to serve from the Parole Decision Guidelines grid."[30] Application of the Parole Decision Guidelines grid "determines" the months to serve, from which the Tentative Parole Month is "calculated."[31]

As Judge Clark observed:

> As this detailed procedure demonstrates, the criteria that guide the Board under the Georgia scheme are far more detailed and particularized, and go much farther in limiting the Board's discretion, than the criteria in the Nebraska and Montana statutes at issue in *Greenholtz* and *Allen*. For example, under the Nebraska statute, the Board could consider "[a]ny . . . factors the board determines to be relevant," while the criteria set out in the Georgia statute and Guidelines grant the Board no such discretion. Likewise, the criteria in the Montana statute were very few and very general, thus permitting the Board far more discretion than the very particularized criteria in the Georgia scheme.

35 F.3d at 1509. *Cf. Allen*, 482 U.S. at 384-85 (O'Connor, J., dissenting) (Montana and Nebraska statutes found to create a liberty interest in *Allen* and *Greenholtz* are "anything but 'particularized' ").

There can be no doubt that the Georgia parole system, like the Nebraska and Montana statutes, contains mandatory language that " 'creat[es] a presumption that parole release will be granted' when the designated findings are made." 482 U.S. at 377-78 (quoting *Greenholtz*, 442 U.S. at 12). The Georgia guidelines state that "[t]he Tentative Parole Month, *during which the offender may expect to be released*, absent new information or other cause to cancel the Board's tentative

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[30] *Id.* ¶ 8-17.02 (emphasis added) (App. 102).

[31] *Id.* ¶ 8-26.01 (App. 107).

release decision, *shall be calculated* by adding the recommended months-to-serve to the compute-from date of the controlling sentence."[32] This provision, combined with the mandatory procedure that the Board must follow to arrive at the recommended months-to-serve, creates even more of an "expectancy of release" than the Nebraska and Montana statutes which were found, for that very same reason, to create a liberty interest in *Greenholtz* and *Allen*.

Moreover, in a section setting out the benefits of the Guidelines system, the Guidelines provide: "*By eliminating the uncertainty of release dates*, inmate morale and sincere participation in rehabilitation programs is enhanced."[33] In formulating the Guidelines pursuant to the statutory mandate, the Board *intentionally* eliminated uncertainty in parole by mandating that an inmate's Tentative Parole Month, *during which he may expect to be released*, be set by applying the Parole Decision Guidelines grid to the inmate's Crime Severity Level and Parole Success Likelihood Score. Like the state parole systems in *Greenholtz* and *Allen*, the Georgia parole system uses mandatory language requiring the Parole Board to apply particularized criteria to arrive at a parole decision. Thus, the conclusion is inescapable that under *Greenholtz* and *Allen*, the Georgia parole system creates a liberty interest giving rise to procedural due process protection.

The dissent below gave three persuasive examples demonstrating that "[t]he majority's reasoning is not grounded in the *Greenholtz* and *Allen* decisions." 35 F.3d at 1510 (Clark, J., dissenting). First, the majority's discussion of the Georgia parole system began with the statement: "We must keep in mind that our analysis is inherently subjective." *Id.* at 1500. As Judge Clark observed:

> The majority does not cite and I am not aware of any authority to support the proposition that a *Greenholtz*-type analysis is "inherently subjective." Under *Greenholtz* and its progeny, we must look to

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[32] *Id.* ¶ 8-27.01 (emphasis added) (App. 107).

[33] *Id.* ¶ 8-2.01(b) (emphasis added) (App. 96).

> the language of the state parole scheme and determine whether that language places "substantive limitations on official discretion." I see nothing "inherently subjective" in this analysis.

Id. at 1510. To characterize the liberty interest analysis as "subjective" not only undermines this Court's precedent, but creates uncertainty for state legislatures relying on that precedent for guidance in formulating statutes and regulations.

Second, the majority conceded that "the Guidelines provide a set of particularized criteria that the Board *must consider* in making parole determinations." *Id* at 1500 (emphasis added). The majority nevertheless concluded that this "set of particularized criteria" does not indicate the existence of a liberty interest because "the Guidelines leave the Board significant discretion in applying the various factors . . . . The Guidelines were not intended to produce a predetermined outcome upon rote application of specific criteria." *Id.* at 1501. The majority ignored the teaching of *Allen*, in which this Court distinguished between two types of discretion:

> In essence, the Court [in *Greenholtz*] made a distinction between two entirely distinct uses of the term discretion. In one sense of the word, an official has discretion when he or she "is simply not bound by standards set by the authority in question." R. Dworkin, Taking Rights Seriously 32 (1977). In this sense, officials who have been told to parole whomever they wish have discretion. In *Greenholtz*, the Court determined that a scheme awarding officials this type of discretion does not create a liberty interest in parole release. But the term discretion may instead signify that "an official must use judgment in applying the standards set him [or her] by authority"; in other words, an official has discretion when the standards set by a statutory or regulatory scheme "cannot be applied mechanically." *Dworkin, supra*, at 31, 32; *see also id* at 69 ("[W]e say that a man has discretion if his duty is defined by standards that reasonable [people] can interpret in different ways"). The court determined in *Greenholtz*

> that the presence of official discretion in this sense is not incompatible with the existence of a liberty interest in parole release when release is *required* after the Board determines (in its broad discretion) that the necessary prerequisites exist.

Id. at 1510 (quoting 482 U.S. at 375-76). As Judge Clark concluded,

> [t]he discretion upon which the majority relies in concluding that the "particularized criteria" in the Guidelines do not indicate the existence of a liberty interest is clearly the *second* type of discretion described by the Court in *Allen*. The majority fails to recognize that this type of discretion is *not* incompatible with the existence of a liberty interest. Just as a liberty interest may exist when "the standards set by a statutory or regulatory scheme 'cannot be applied mechanically' " so a liberty interest may also exist when "[t]he Guidelines do not envision the rote application of specific criteria. . . . "

Id. at 1510 (quoting *id.* at 1500) (emphasis in original).

Third, the majority failed to acknowledge that the 1980 change in the Georgia parole law is analogous to the change in the Montana parole statute upon which this Court relied in *Allen* to support its conclusion that the new statute created a liberty interest in parole. Prior to 1980, in Georgia there was no statutory requirement that the Board exercise its parole powers in accordance with any specific guidelines or regulations; the statute granted the Board absolute discretion, just as the old Montana statute had. In 1980, when the Georgia legislature enacted O.C.G.A. § 42-9-40, it mandated that parole determinations be made in accordance with the Parole Guidelines System. Under *Allen*, this change in the law is similarly an " 'indication of legislative intent to cabin the discretion of the Board.' " *Id.* at 1511 (quoting 482 U.S. at 381).

B. Under *Allen*, O.C.G.A. § 42-9-42 Is Consistent With A Liberty Interest in Parole.

The majority relied heavily on O.C.G.A. § 42-9-42, a statute in place prior to the enactment of O.C.G.A. § 42-9-40, as creating a "presumption *against* parole." *Id.* at 1502. In fact, O.C.G.A. § 42-9-42 is very similar to a provision of the Montana statute at issue in *Allen*. O.C.G.A. § 42-9-42(c) provides, in part:

> No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society.

The Montana statute similarly provided, "[a] prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law abiding citizen."[34] O.C.G.A. § 42-9-42 further provides in part:

> [N]o person shall be released on pardon or parole or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge.

The Montana statute likewise provided in part:

> A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon.[35]

In *Allen* this Court did not read the Montana statute as creating a presumption against parole; to the contrary, it read the portions of the statute quoted above as a *further constraint* on the discretion of the board, preventing the board from deciding in favor of release when the prisoner is unable to " 'fulfill the obligations of a law-abiding citizen.' " *Id.*, 482 U.S. at 380 (quoting Mont. Code Ann. § 46-23-201(2)

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[34] 482 U.S. at 376 (quoting Mont. Code Ann. § 46-23-201 (1985)).

[35] *Id.*

(1985)). Likewise, under *Allen*, O.C.G.A. § 42-9-42 can only be interpreted as a further constraint on the discretion of the Board, not as a presumption against release. Consistent with the purpose and intent of the Georgia Parole Guidelines System, O.C.G.A. § 42-9-42 prohibits the Board from releasing a prisoner who cannot "live and conduct himself as a respectable and law-abiding person." Thus, any conclusion other than that O.C.G.A. § 42-9-42 is compatible with the liberty interest in parole created by the Georgia parole scheme "flies in the face of [this Court's] decision in *Allen*." 35 F.3d at 1511 (Clark, J., dissenting).

C. The Majority, In Attempting To Avoid The Holdings Of *Greenholtz* And *Allen*, Have Rendered The Georgia Parole Guidelines System Meaningless.

In concluding that the Guidelines leave too much discretion to the Board to create a liberty interest, the majority relied on the Board's own statements in Georgia Rule 475-3-.05(5), in which the Board purports to reserve its discretion to "disagree" with the Guidelines, and Annexure 2 of the Guidelines, which purports to reserve the Board's decision to "depart" from the Guidelines.[36]

> First,
>
> *The Guidelines do not, however, provide a procedure for departures.* That is, there is absolutely nothing in the Guidelines to indicate when or how the Board is to go about disagreeing with, or departing from, the Tentative Parole Month. Neither do the Guidelines indicate what factors or criteria the Board should consider in determining whether departure is appropriate. Rather, the Guidelines simply declare, in Annexure 2, that "the Board may depart from the Guidelines recommendation and

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[36] These two provisions also set out the Board's opinion that O.C.G.A. § 42-9-40 and the Guidelines system adopted pursuant thereto do not create a liberty interest in parole.

> make an independent decision . . . . " It is inconceivable that the Georgia legislature intended to establish a detailed and particularized system for arriving at an inmate's Tentative Parole Month, "during which the offender may expect to be released," only to grant the Board the unfettered discretion to completely disregard the system.

Id. at 1512 (emphasis in original).

Second, there are provisions in the Guidelines that are themselves inconsistent with the Board's position that it has unfettered discretion to depart from the Guidelines Grid determination for any reason or no reason at all. For example, the Guidelines provide a procedure by which an inmate may request reconsideration of his months-to-serve calculation.[37] The Guidelines specifically provide, however, that such requests "are limited to alleged errors in the Crime Severity Level and/or the Parole Success Factor Scores."[38] Thus, under the Guidelines, an inmate may request reconsideration of the two factors that determine his Tentative Parole Month, *but he may not request reconsideration or otherwise contest the Board's decision to depart from* this Tentative Parole Month. It makes no sense to provide a procedure for contesting the determination of the Tentative Parole Month but not provide for contesting the decision to depart therefrom.

Another example of the Guidelines' incompatibility with the Board's position is ¶ 8-12.01, which provides that an inmate's Crime Severity Level shall be determined "based on actual convictions of record, without reference to original arrest or booking charges, or *allegations in accusations or indictments for which an actual conviction was not obtained.*"[39] The Board has nevertheless taken the position that it may consider any information in deciding, in its unfettered discretion, whether to depart from the Guidelines. Mr.

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[37] Parole Decision Guidelines System ¶¶ 8-29.01 through 8-29.04 (App. 107-108).

[38] *Id.* ¶ 5.2; *see* Ga. Comp. R. & Regs. 475-3-.05(5).

[39] *Id.* ¶ 8-12.01 (emphasis added) (App. 99).

Sultenfuss is a case in point. Mr. Sultenfuss' parole rating summary sheet includes the follow comments:

> [M]ajor drug dealer of cocaine in Macon for years and always claims entrapment. Will have numerous lawyers telling us he's a great fellow. Paroled on cocaine charges revoked based on new cocaine charge received maximum sentence of 15 years to serve. This is a small quantity case which is out of character for him.[40]

Thus, in departing from the Guidelines in Mr. Sultenfuss' case, the Board certainly considered "accusations . . . for which an actual conviction was not obtained." "To prevent the Board from considering certain information during the calculation of the Tentative Parole Month, when the inmate may challenge the information, but then permit the Board to consider the very same information during the contemporaneous departure decision, when the inmate has no recourse, defies logic and common sense." 35 F.3d at 1513.

As a final example, the Tentative Parole Month is defined as the month in which "the offender may expect to be released, absent new information or other cause to cancel" the release decision.[41] The Guidelines thereby provide an "out" for the Board when release in the Tentative Parole Month is inappropriate because of newly acquired information or, for example, because of institutional misconduct. The Board, however, routinely departs from the Guidelines in setting the Tentative Parole Month – a departure for which the Guidelines make no provision – rather than after it is set, as the Tentative Parole Month approaches, for which the Guidelines explicitly provide.[42] The Board's position regarding its discretion, although endorsed by the majority, is contrary to the Georgia parole guidelines system as a whole.

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[40] 35 F.3d at 1513 (quoting R1-33, Ex. 1, Attachment A).

[41] Parole Decision Guidelines System ¶ 8-27.01 (App. 107).

[42] The Guidelines provide detailed procedures for revising the Tentative Parole Month prior to release. *See id.* at 8-30.01 through 8-39.02 (App. 108-113).

CONCLUSION

In 1980, the Georgia legislature took away the absolute discretion of the State's Parole Board, mandating the adoption and use of a parole guidelines system to make uniform and consistent parole decisions on all inmates, free of arbitrary and discriminatory influences and subject to the strictures of due process. In concluding that the Georgia parole system does not create a liberty interest in parole invoking procedural due process, the majority's opinion is contrary to the binding precedent of this Court set forth in *Greenholtz, Allen*, and subsequent cases. Accordingly, this petition for certiorari should be granted and the judgment of the Eleventh Circuit Court of Appeals reversed.

This 3rd day of January, 1995.

Respectfully submitted,

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Stephen SULTENFUSS,
Plaintiff-Appellant,

Charles McMulling, et al., Plaintiffs,

v.

Wayne SNOW, Jr., James T. Morris, Mobley Howell, Michael H. Wing, Bettye O. Hutchings, Michael J. Bowers,
Defendants-Appellees.

No. 91-8002.

United States Court of Appeals,
Eleventh Circuit.

Oct. 5, 1994.

Inmates brought action challenging release dates set by Georgia Board of Pardons and Parole [sic]. The District Court dismissed, and one inmate appealed. The Court of Appeals, 894 F.2d 1277, affirmed in part and reversed in part. On remand, The United States District Court for the Northern District of Georgia, No. 1:88-cv-1563-GET, G. Ernest Tidwell, J., granted Board's motion for summary judgment, and inmate appealed. The Court of Appeals reversed, 7 F.3d 1543, but rehearing en banc was granted, 14 F.3d 572. The Court of Appeals, Birch, Circuit Judge, held that Georgia parole system does not create legitimate expectation of parole, giving rise to liberty interest protected by due process.

Affirmed.

Carnes, Circuit Judge, dissented and filed an opinion.

Clark, Senior Circuit Judge, dissented and filed an opinion in which Kravitch, Hatchett and Barkett, Circuit Judges, joined.

Stephen G. Sultenfuss, Anna Maria, FL, Jill A. Pryor, Bondurant Mixon [sic] & Elmore, Atlanta, GA, for appellant.

David A. Webster, Sumner & Hewes, Atlanta, GA, for amicus – ACLU of Ga.

Michael J. Bowers, Atty. Gen., Daryl Alan Robinson, Terry L. Long, Atlanta, GA, for appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges,* and CLARK**, Senior Circuit Judge.

BIRCH, Circuit Judge:

In this case, we must decide whether the current Georgia parole system, as embodied in the Georgia Constitution, the Georgia statutes, and the rules and guidelines promulgated pursuant to the statutes, creates a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment. The district court found no protected liberty interest, and we affirm.

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*Judge J.L. Edmondson recused himself and did not participate in this decision.

**Senior U.S. Circuit Judge Thomas A. Clark elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

I. BACKGROUND

A. The Georgia Parole Guidelines System

The Georgia parole system is set out in the Georgia Constitution, several Georgia statutes, and the rules and regulations promulgated by the state Board of Pardons and Paroles (the "Board") pursuant to those statutes. The Georgia Constitution vests the Board with the exclusive power to grant reprieves, pardons, and paroles. Ga. Const. art. IV, § 2, ¶ 2. In 1980, the Georgia legislature enacted a law requiring the Board to implement a parole guidelines system. That statute provides in pertinent part:

> The board shall adopt, implement, and maintain a parole guidelines system for determining parole action. The guidelines system shall be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system shall be consistent with the board's primary goal of protecting society and shall take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.

O.C.G.A. § 42-9-40(a). Section 42-9-40 is qualified, however, by section 42-9-42, which provides in relevant part:

> No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be

> compatible with his own welfare and the welfare of society. Furthermore, no person shall be released on pardon or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge.

Id. § 42-9-42(c).

Pursuant to these provisions, the Board adopted and maintains the Georgia Parole Decision Guidelines System (the "Guidelines").[1] That system is embodied in the rules

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[1] There is some debate between the parties as to what documents are properly part of the record on appeal. In order to derive the contents of the Guidelines, the district court relied primarily on the affidavit of Christopher Hamilton, the Director of Legal Services for the Board. R1-32 Ex. 3. That affidavit, attached to the Board's motion for summary judgment, describes the functioning of the guidelines system and contains a document entitled "State Board of Pardons and Paroles Parole Decision Guidelines." R1-32 Ex. 3, Attach. B. The district court also relied upon Ga.R. ch. 475-3-.05, which sets out the framework for the parole guidelines system. R1-32 Ex. 2.

The document entitled "Parole Decision Guidelines System," contained in the Appendix to Appellant's Brief, was introduced for the first time on appeal. Apparently, that document is part of the Board's internal operating manual. The Board contends that this document is not properly part of the record on appeal. For two reasons, and in the interest of judicial economy, we will consider the document in this appeal. First, the Board has never contended that this document is not a true and correct copy of the guidelines system. *See Sultenfuss v. Snow*, 7 F.3d 1543, 1548 n. 21 (11th Cir.1993) (panel opinion considering document for same reason), *vacated and reh'g en banc granted*, 14 F.3d 572 (11th Cir.1994). Second, even taking into consideration the language from this document, we find that a liberty interest in parole does not exist. Therefore, our result would be unaffected by exclusion of the document.

and regulations passed by the Board pursuant to O.C.G.A. § 42-9-40 and in accordance with the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1 *et seq.* The stated purpose of the Guidelines is as follows: "In the parole decision process, the Board shall utilize a set of guidelines which consider both the severity of an individual's offense and the likelihood of the individual successfully completing a term of supervision on parole." Parole Decision Guidelines System ¶ 8-1.01.

Other rules and regulations of the Board also shed light on the purpose and function of the system. Chapter 475-3-.05, for instance, provides as follows:

> The Parole Decision Guidelines System is an aid to the Board in making more consistent, soundly based and explainable parole decisions and does not create a liberty interest. The Board specifically reserves the right to exercise its discretion under Georgia Law to disagree with the recommendation resulting from application of the Parole Decision Guidelines and may make an independent decision to deny parole or establish a Tentative Parole Month at any time prior to sentence expiration.

Ga.R. ch. 475-3-.05. Moreover, Annexure 2, an essential component of the Guidelines, contains similar language:

> Parole Decision Guidelines help the Board make a more consistent, soundly based, prompt, and explainable parole decision. Guidelines help the Board decide on a Tentative Parole Month for the inmate or decide that the inmate will complete his sentence without parole. When making decisions, the Board may depart from the

> Guidelines recommendation and make an independent decision using the full discretion given it under Georgia Law. The length of the prison sentence imposed by the court will be considered in establishing a Tentative Parole Month.

Parole Decision Guidelines System, Annexure 2.[2] These provisions set forth the fundamental purpose and function of the Guidelines.

The Guidelines establish a step-by-step procedure for the Board to follow in making parole determinations for eligible inmates. First, the Board assigns the inmate a Crime Severity Level. According to the Guidelines, "[t]he Board deems the nature of the offense to be the most important element in the parole decision. Consequently, the guidelines are to be structured around a Crime Severity Index ranking crimes by increasing degree of seriousness." Parole Decision Guidelines System ¶ 8-1.01. Using a table ranking various crimes in terms of severity, the Board assigns each eligible inmate a Crime Severity Level of I to VII.

Next, the Board assigns the inmate a Parole Success Likelihood Score. "The second component of the Parole

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[2] Significantly, the first paragraph of Annexure 2 provides:

> *NOTICE:* THE BOARD SPECIFICALLY RESERVES THE RIGHT TO EXERCISE ITS DISCRETION UNDER GEORGIA LAW TO DENY PAROLE EVEN THOUGH GUIDELINES CRITERIA ARE MET BY AN INMATE. IT IS NOT THE INTENTION OF THE BOARD TO CREATE A "LIBERTY INTEREST" OF THE TYPE DESCRIBED IN GREENHOLTZ VS. NEBRASKA PENAL INMATES 442 US 1 (1979).

Parole Decision Guidelines System, Annexure 2.

Decision Guidelines System combines eight social and criminal history factors found to relate to the likelihood of one's success on parole, which are labeled 'Parole Success Factors.' " *Id.* ¶ 8-17.01. Rating the inmate on each of these eight factors, the Board arrives at a Parole Success Likelihood Score ranging form [sic] 0 to 20 for each inmate.

The Board then uses the Parole Decision Grid to formulate the months-to-serve recommendation. The Parole Decision Grid combines the inmate's Crime Severity Level with the Parole Success Likelihood Score to arrive at a months-to-serve recommendation. Adding the months-to-serve recommendation to the date of the controlling sentence provides the inmate's Tentative Parole Month. "The Tentative Parole Month, during which the offender may expect to be released, absent new information of other cause to cancel the Board's tentative release decision, shall be calculated by adding the recommended months-to-serve to the compute-from date of the controlling sentence." *Id.* ¶ 8-27.01.

A central point of contention between the parties is whether the Tentative Parole Month is a final, binding determination. The appellant argues that the Tentative Parole Month may be changed only for "new information or other cause," *id.*, as specified in the Guidelines. The Board, on the other hand, maintains that it has the authority to exercise discretion in departing from the grid recommendation. As noted earlier, several of the rules

and regulations expressly provide for departure.[3] Annexure 2, which contains the Parole Decision Grid, states that "the Board may depart from the Guidelines recommendation and make an independent decision using the full discretion given it under Georgia Law." *Id.*, Annexure 2.[4] The Board thus maintains that, in arriving at the Tentative Parole Month, it considers the individual circumstances in each inmate's case, as well as the recommendation of the Parole Decision Grid.

B. Application of the Guidelines to Sultenfuss

The appellant, Stephen Sultenfuss, was convicted of two separate drug charges involving possession of cocaine. He received two concurrent sentences, the longest of which was fifteen years set to run from August 24, 1986, and set to expire on August 23, 2001.[5]

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[3] *See supra* text accompanying note 2.

[4] Annexure 2 even provides a procedural safeguard for reviewing extreme departures from the Guidelines: "If the Board's tentative decision is to depart from the Guidelines recommendation, and the number of months to serve is more than three years beyond the Guidelines recommendation, the case will be reviewed at the Guidelines recommendation and each three years thereafter." Parole Decision Guidelines System, Annexure 2.

[5] Sultenfuss was released on parole after serving approximately four and one-half years and is no longer under active parole supervision. Nevertheless, we have concluded that this case is not moot because the issue presented is "capable of repetition, yet evading review." *See Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969).

In order to determine Sultenfuss' Tentative Parole Month, the Board used the Guidelines. Based on his two convictions, Sultenfuss' Crime Severity Level was II. The Board then analyzed the Parole Success Factors and gave Sultenfuss a Parole Success Likelihood Score of 11. Based on these two scores, the Parole Decision Grid resulted in a recommended incarceration period of ten months before parole. Nevertheless, the Board departed from the grid recommendation. Finding that the Crime Severity Level and Parole Success Factors did not adequately reflect the true nature of Sultenfuss' case,[6] the Board recommended a term of 61 months, yielding a Tentative Parole Month of January 1992.[7]

On July 15, 1988, Sultenfuss and several other inmates filed a *pro se* complaint under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Georgia. Claiming that the Board had violated their rights to due process and equal protection by departing

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[6] Specifically, the Board in its Notice of Tentative Action provided the following reasons for its departure:

> The severity of your offense(s) exceeds that accounted for in the Crime Severity Level. Factor D ["Parole or Probation Failure"] does not fully reflect the seriousness of your prior parole failures.
> The success factors do not fully reflect the seriousness and scope of your criminal history. The success factors do not fully reflect the extent of your prior drug involvement.

R1-32 Ex. 3, Attach. C.

[7] Sultenfuss' Tentative Parole Month was later adjusted slightly in conjunction with a periodic review to account for prison overcrowding. That adjustment is not pertinent to our analysis.

from the grid recommendation in setting release dates, the inmates sought declaratory and injunctive relief as well as compensatory damages. Relying on *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir.) (finding no liberty interest in Georgia parole system prior to 1980 changes), *cert. denied*, 459 U.S. 1043, 103 S.Ct. 462, 74 L.Ed.2d 612 (1982), the district court *sua sponte* dismissed the complaint as frivolous under 28 U.S.C. § 1915(d).

Sultenfuss was the only inmate to appeal the district court's dismissal. On appeal, we affirmed the dismissal of the claim for compensatory damages, but reversed the dismissal of the due process claim. *Sultenfuss v. Snow*, 894 F.2d 1277 (11th Cir.1990) (per curiam). We held that the district court erred by relying on *Slocum* because that decision had dealt with the previous parole system and did not address the issue under the current system. "While upon close examination, these changes may not have had an actual impact upon the Georgia parole system to vindicate the due process claim at issue, the changes are sufficiently significant to raise an arguable question of law so as to preclude § 1915(d) dismissal." *Sultenfuss*, 894 F.2d at 1279. We thus remanded the case to the district court for further proceedings.

On remand, the district court appointed counsel to represent Sultenfuss, and Sultenfuss filed a restated complaint. On August 14, 1990, the Board filed a motion for summary judgment. Finding that Georgia's parole system does not create a liberty interest protected by the Due Process Clause, the district court granted the Board's motion for summary judgment.

Sultenfuss appealed *pro se* to this court, and, after briefs were filed, we appointed new counsel to represent him. Reversing the district court's grant of summary judgment, a panel of this court held that the current parole system does create a protected liberty interest. *Sultenfuss v. Snow*, 7 F.3d 1543, 1449-50 (11th Cir.1993), *vacated and reh'g en banc granted*, 14 F.3d 572 (11th Cir.1994). The panel concluded that "the mandatory language of the statute and the Guidelines, combined with the particularized standards that guide the Board's parole determinations, create a liberty interest in parole release in Georgia." *Id.* at 1550-51. On February 4, 1994, we vacated the panel opinion and granted rehearing en banc. We now affirm the district court's grant of summary judgment and find that the Georgia parole system does not create a liberty interest protected by the Due Process Clause.

II. DISCUSSION

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that the moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When a summary judgment motion has been made and properly supported, the nonmoving party may not rest upon its pleading, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In

making this determination, the district court "should 'resolve all reasonable doubts about the facts in favor of the non-movant' and draw 'all justifiable inferences . . . in his favor.' " *United States v. Four Parcels of Real Property,* 941 F.2d 1428, 1437 (11th Cir.1991) (alteration in original) (citations omitted). We review grants of summary judgment *de novo,* applying the same standards as the district court. *Bannum, Inc. v. City of Fort Lauderdale,* 901 F.2d 989, 996 (11th Cir.1990).

B. Creation of a Liberty Interest

Sultenfuss alleges that the Board's departure from the grid recommendation violated his rights under the Due Process Clause of the United States Constitution. The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The requirements of procedural due process, therefore, "apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). As the Supreme Court has explained,

> [t]he types of interests that constitute "liberty" and "property" for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than "an abstract need or desire" and must be based on more than "a unilateral hope." Rather, an individual claiming a protected liberty interest must have a legitimate claim of entitlement to it.

Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506 (1989) (citations omitted). In order to establish that the Board violated his rights to due process, therefore, Sultenfuss first must demonstrate that the Georgia parole system provides inmates with a liberty interest in parole.

In *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the Supreme Court recognized that the mere establishment of a parole system by a state does not automatically create a liberty interest in parole. "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7, 99 S.Ct. at 2104, This is not to say, however, that the establishment of a parole system cannot give rise to a liberty interest in parole.

When a state parole system creates a legitimate expectation of parole, an inmate has a liberty interest protected by the Due Process Clause. *Id.* at 12, 99 S.Ct. at 2106. In *Greenholtz*, for instance, the Court found a Nebraska parole statute stating that the parole board "shall order [the inmate's] release unless it is of the opinion that his release should be deferred because" one of four specified criteria is met created a protectible liberty interest in parole. *Id.* at 11, 99 S.Ct. at 2106. Based on the mandatory language of the statute and the presumption that parole be granted unless one of the factors is present, the Court accepted the inmates' view that the statute created an expectation of release protected by the Due Process Clause.

Likewise, in *Board of Pardons v. Allen*, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987), the Court analyzed a Montana parole statute similar to the statute in *Greenholtz*. The Montana statute stated that "the board shall release on parole . . . any [inmate] when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community." *Id.* at 376, 107 S.Ct. at 2420 (emphasis omitted) (first alteration in original). According to the Court, the statute placed "substantive predicates" on the discretion of the decisionmakers and used mandatory language to create a presumption that release would be granted unless the designated findings are made. *Id.* at 377-80, 107 S.Ct. at 2420-21. Therefore, the Court found that a liberty interest existed.

In other cases, however, the Court has found that penal regulations and parole guidelines do not implicate the Due Process Clause where no liberty interest exists. In *Thompson*, for instance, the Court analyzed Kentucky prison regulations to determine whether inmates had a liberty interest in visitation. There, the Court focused on the discretion vested in state decisionmakers: "Stated simply, 'a State creates a protected liberty interest by placing substantive limitations on official discretion.' " *Thompson*, 490 U.S. at 462, 109 S.Ct. at 1909 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983)). The Court also emphasized the "requirement, implicit in our earlier decisions, that the regulations contain 'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Id.* at 463, 109 S.Ct. at 1910. The Court

found that the regulations at issue lacked the requisite mandatory language because "[t]hey stop short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Id.* at 464, 109 S.Ct. at 1910. The Court also focused on language in the regulations in which the administrative staff reserved the right to allow or disallow prison visits.

While the Supreme Court has written extensively on whether various prison guidelines create a liberty interest, the Court has declined to set forth any definitive rules. Instead, the Court has emphasized that "whether any . . . state statute provides a protectible entitlement must be decided on a case-by-case basis." *Greenholtz,* 442 U.S. at 12, 99 S.Ct. at 2106. In conducting this case-specific analysis, we are bound by certain principles. After reviewing the relevant caselaw from the Supreme Court and this circuit, we conclude that three, sometimes overlapping, factors are crucial in determining whether a liberty interest is created: (1) whether the system places substantive limitations on the discretion of the decision-makers; (2) whether the system mandates the outcome that must follow if the substantive predicates are met; and (3) whether the relevant statutes and regulations contain explicitly mandatory language dictating the procedures that must be followed and the result that must be reached if the relevant criteria are satisfied. We explain these factors in more detail below as we examine their application to Georgia's parole system.

C. The Georgia Parole System

In examining these three factors in relation to the Georgia parole system, we must keep in mind that our analysis is inherently subjective. The Supreme Court has recognized that "[n]either the drafting of regulations nor their interpretation can be reduced to an exact science." *Thompson*, 490 U.S. at 462, 109 S.Ct. at 1909. The Georgia statutes and regulations must be read together to derive the overriding purpose and function of the parole guidelines system. With this caveat in mind, we proceed to analyze the Georgia parole system in light of the three factors set forth above.

First, we must determine whether the system places substantive predicates on the discretion of state officials. *See Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983). The inmate must establish that the statute or regulations provide particularized criteria for the decisionmaker to follow, *id.*, and that these standards "*meaningfully* constrain the discretion of state officials," *Allen*, 482 U.S. at 384, 107 S.Ct. at 2424 (O'Connor, J., dissenting). In *Slocum*, we recognized the "critical distinction between 'a scheme that requires release "unless adverse findings based on [specific] criteria are made" [and] a scheme that simply obligates the board to consider such criteria in exercising its discretion.' " *Slocum*, 678 F.2d at 941 (quoting *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir.1979)) (alteration in original).

We conclude that the Georgia parole system more closely fits within the latter category. Without a doubt, the Guidelines provide a set of particularized criteria that

the Board must consider in making parole determinations. The crucial inquiry, however, is whether the relevant statutes and regulations provide standards that meaningfully limit the discretion of the decisionmakers. Not only do the Guidelines leave the Board significant discretion in applying the various factors, but the Board, in promulgating the Guidelines, expressly reserved the authority to depart from the grid recommendation. The criteria in the Guidelines provide a framework to "help the Board make a more consistent, soundly based, prompt, and explainable parole decision." Parole Decision Guidelines System, Annexure 2. The Guidelines were not intended to produce a predetermined outcome upon rote application of specific criteria.

Sultenfuss places great reliance on language from the parole statute mandating that the "guidelines system shall be used in determining parole actions on all inmates." O.C.G.A. § 42-9-40. He argues that this language and the language in the Guidelines dictating the criteria to be considered "constitute specific, substantive limitations on the board's exercise of discretion." Appellant's En Banc Brief at 20-21. We disagree; this language is consistent with the substantial discretion that the Guidelines reserve for the Board. The Board's decision to depart from the grid recommendation does not mean that the Guidelines were not *used* in determining parole action. The Board may utilize the Guidelines as a framework for making parole determinations, while still exercising the authority to depart from the grid recommendation if other factors, not adequately considered by the Guidelines, warrant such a decision. Therefore, we find that Georgia's parole system does not place

limitations on the Board's discretion sufficient to create a liberty interest in parole.

Second, we examine whether the system mandates the outcome that must be reached if the relevant criteria have been met. *Thompson*, 490 U.S. at 462, 109 S.Ct. at 1909. Where the statute or regulation creates a presumption that release will be granted upon a finding that the substantive predicates have been met,[8] a liberty interest in parole exists. *Thompson*, 490 U.S. at 463-64, 109 S.Ct. at 1910. In those cases where the Supreme Court has found a liberty interest, the Court has focused on the presumption of release found in the relevant statute or guidelines. *See, e.g, Allen*, 482 U.S. at 376, 107 S.Ct. at 2420 ("the board shall release on parole . . . any [inmate] when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community" (emphasis omitted) (first alteration in original)); *Hewitt v. Helms*, 459 U.S. 460, 470 n. 6, 103 S.Ct. 864, 871 n. 6, 74 L.Ed.2d 675 (1983) ("If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated. . . . "); *Greenholtz*, 442 U.S. at 11, 99 S.Ct. at 2106 ("the Board . . . shall order [the inmate's] release unless it is of the opinion that his release should be deferred because" one of four criteria is met).

We do not find such a mandate in the Georgia statutes and regulations. Neither the relevant statutes nor the

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[8] The Court has recognized that there is no difference between a system that mandates release *if* certain criteria are met and one that mandates release *unless* certain criteria are met. *Allen*, 482 U.S. at 378, 107 S.Ct. at 2421.

Guidelines contain any language mandating the outcome that must be reached after application of the specified procedures. Conversely, the Georgia statutes actually create a presumption *against* parole. Section 42-9-42, O.C.G.A., provides that "[n]o inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society." O.C.G.A. § 42-9-42(c). This section must be read as a qualification of section 42-9-40, the provision requiring adoption of the parole guideline system. Thus, while the legislature has required the Board to adopt a guideline system to be used as a framework for making more consistent parole decisions, it also preserved the Board's authority to use its discretion in making final parole decisions.[9] The statute and regulations, therefore, do not mandate that release be granted if the Guidelines criteria is met.

Finally, we look at the relevant statute and regulations to see if they contain explicitly mandatory language directing the decisionmaker to follow certain procedures. *Thompson*, 490 U.S. at 462, 109 S.Ct. at 1909-10. Although this third factor largely merges with the second, we find

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[9] This interpretation is the only way that the two provisions can be harmonized. Section 42-9-42 *prohibits* the Board from releasing an inmate on parole until it believes certain subjective criteria are met. Thus, if application of the Guidelines in a particular case results in a recommendation of parole, but the Board is not satisfied that the criteria in section 42-9-42 are met, the Board is statutorily *required* to depart from the grid recommendation.

the use of explicitly mandatory language to be an important factor in determining whether a liberty interest exists.

> It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question.

Id. at 464 n. 4, 109 S.Ct. at 1910 n. 4. We recognized this crucial distinction in *Staton v. Wainwright*, 665 F.2d 686 (5th Cir. Unit B), *cert. denied*, 456 U.S. 909, 102 S.Ct. 1757, 72 L.Ed.2d 166 (1982), where we found no protectable liberty interest in the Florida parole statutes. Although the Florida statutes were replete with mandatory language, we recognized that this language dictated what criteria should be considered, not what result must follow if those criteria are met. *Id.* at 688.

Similarly, as the panel in this case recognized, the Georgia statutes and regulations frequently use mandatory language. *See Sultenfuss*, 7 F.3d at 1547-49 (highlighting use of the word "shall" in the relevant statutes and regulations). We find no mandatory language, however, expressly dictating the outcome that must follow if the criteria are met. The statutes mandate the implementation of a guidelines system, and the Guidelines mandate certain procedures that must be followed. But the Guidelines *do not mandate release* if the criteria are met. As noted above, the statutory presumption is *against* parole unless

certain subjective criteria are satisfied. *See* O.C.G.A. § 42-9-42.

Viewing Georgia's parole system in its entirety, we conclude that no protected liberty interest in parole is created. To give rise to a liberty interest in parole, the statutes and regulations must meaningfully limit the discretion of state officials. Here, the substantial discretion reserved by the Board belies any claim to a reasonable expectation of parole. Although the Board is required to follow some relatively strict procedures, the statutes and the Guidelines, acting in conjunction, do not mandate the grant of parole if specified criteria are satisfied. Instead, the system contains a statutory presumption against parole and an explicit reservation of authority to depart from the grid recommendation, negating any reasonable claim of an entitlement to parole.

D. *Deference to Administrative Interpretations*

Our conclusion that the Georgia parole system does not create a protected liberty interest is strengthened by another factor, the Board's own interpretation of the Guidelines. It is a well-established rule of statutory construction in Georgia that the interpretation of a statute or regulation by an administrative agency responsible for enforcement of the provision is entitled to great deference, unless clearly erroneous. *E.g., Hospital Auth. v. State Health Planning Agency,* 211 Ga.App. 407, 408, 438 S.E.2d 912, 914 (1993), *cert. denied,* (Ga.1994); *National Advertising Co. v. Department of Transp.,* 149 Ga.App. 334, 337, 254 S.E.2d 571, 573 (1979); *Mason v. Service Loan & Fin. Co.,* 128 Ga.App. 828, 831, 198 S.E.2d 391, 394 (1973); *Belton v.*

Columbus Fin. & Thrift Co., 127 Ga.App. 770, 772, 195 S.E.2d 195, 197 (1972). Here, the Board is the administrative agency responsible for implementation of the statute and Guidelines under consideration. Under O.C.G.A. § 42-9-40, the Board has the responsibility for adopting, implementing, and maintaining a parole guidelines system. Pursuant to that statute, the Board adopted the Guidelines under consideration here and is the sole administrative agency responsible for administering the parole system. Therefore, unless its interpretation is unreasonable, it deserves great deference.

The Board has unequivocally evinced its opinion that the statute and Guidelines do not create a liberty interest in parole. In several portions of the rules and regulations promulgated pursuant to O.C.G.A. § 42-9-40, the Board has expressly reserved the right to depart from the grid recommendation. *See* Ga.R. ch. 475-3-.05. In fact, the portion of the Guidelines that contains the parole decision grid has the following "NOTICE" in capital letters at the top of the page:

> THE BOARD SPECIFICALLY RESERVES THE RIGHT TO EXERCISE ITS DISCRETION UNDER GEORGIA LAW TO DENY PAROLE EVEN THOUGH GUIDELINES CRITERIA ARE MET BY AN INMATE. IT IS NOT THE INTENTION OF THE BOARD TO CREATE A LIBERTY INTEREST OF THE TYPE DESCRIBED IN GREENHOLTZ V. NEBRASKA PENAL INMATES 442 US 1 (1979).

Parole Decision Guidelines System, Annexure 2. The Board's unequivocal interpretation of the statute and Guidelines, therefore, is that no protected liberty interest

is created.[10] Because we find this interpretation to be reasonable, we owe it deference. We agree with the Board that Georgia's parole system does not create a liberty interest in parole protected by the Due Process Clause.

III. CONCLUSION

The district court found that Georgia's parole system does not create a liberty interest in parole implicating the protections of the Due Process Clause. Georgia's parole system contains a statutory presumption against parole and fails to limit meaningfully the discretion of state officials. We therefore agree with the district court that Georgia inmates do not have a legitimate expectation of parole. Because the protections of the Due Process Clause do not arise without a protectable liberty interest, the district court properly granted summary judgment to the Board.

AFFIRMED.

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[10] While Sultenfuss relies heavily on certain language from the Guidelines to show the existence of a liberty interest, he ignores or downplays language that expressly refutes his interpretation. Sultenfuss cannot have it both ways. If, in searching for a liberty interest, we look to the language that the Board used in drafting the Guidelines, we must look at all of the language, not just portions of it. Taking as a whole all of the rules and regulations promulgated by the Board pursuant to O.C.G.A. § 42-9-40, we must agree with the Board's interpretation that the parole system does not create a liberty interest in parole.

CARNES, Circuit Judge, dissenting:

I dissent from the Court's failure to certify to the Georgia Supreme Court the unsettled questions of state law which control the disposition of this case.

The majority opinion and Judge Clark's dissenting opinion disagree not so much about applicable federal constitutional law as about applicable state law. The disagreement is over whether the relevant Georgia statutes permit the Parole Board to reserve to itself essentially unfettered discretion, which is what it has attempted to do with the adoption of Ga.R. ch. 475-3-.05 and Annexure 2 to the Parole Decision Guidelines System. The state law validity of those two Board-adopted provisions is a premise essential to the majority's conclusion that the Georgia parole system has not created a liberty interest. Likewise, the state law invalidity of those two provisions is a premise essential to Judge Clark's conclusion that a liberty interest has been created. The competing syllogisms are each logical: each one's conclusion follows from its premises. I agree with the majority that if the two provisions in question are valid under state law, so that the Board does have the substantial discretion it claims, then no liberty interest has been created. I also agree with Judge Clark that if the two provisions are not valid under state law, so that the Board lacks the substantial discretion it claims, then a liberty interest has been created.

It is the accuracy of the competing state law premises that is in dispute. Only one of them can be correct, and the case turns on which one is. The majority makes a strong argument that the Board's adoption of Rule 475-3-.05 and Annexure 2 was within its authority under

Georgia law. Judge Clark, joined by three other judges of this Court, makes an equally strong argument to the contrary. I do not know whether the majority or Judge Clark is right about the Georgia law question, but I do know where we can, and should, turn for the answer.

We have discretion to certify controlling but unanswered questions of Georgia law to the Georgia Supreme Court. *See* GA. CONST. art. VI, § 6, para. 4; O.C.G.A. § 15-2-9 (1994); GA.SUP.CT.R. 37. We have not hesitated to do so in the past. In the last five years, we have certified state law questions to the Georgia Supreme Court in no fewer than 19 cases.* As our frequent resort

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Echols v. Thomas, 33 F.3d 1277 (11th Cir.1994); *Kitchen v. CSX Transp., Inc.*, 19 F.3d 601 (11th Cir.1994); *Blackford v. Wal-Mart Stores, Inc.*, 17 F.3d 367 (11th Cir.1994); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986 (11th Cir.1993); *Hardaway Co. v. Amwest Sur. Ins. Co.*, 986 F.2d 1395 (11th Cir.1993); *Gas Pump, Inc. v. General Cinema Beverages of N. Fla., Inc.*, 982 F.2d 478 (11th Cir.1993); *Amica Mut. Ins. Co. v. Bourgault*, 979 F.2d 187 (11th Cir.1992); *Gonzalez v. Abbott*, 967 F.2d 1499 (11th Cir.1992); *Bradway v. American Nat'l Red Cross*, 965 F.2d 991 (11th Cir.1992); *Granite State Ins. Co. v. Nord Bitumi U.S., Inc.*, 959 F.2d 911 (11th Cir.1992); *W.R. Grace & Co., Dearborn Div.-Conn. v. Mouyal*, 959 F.2d 219 (11th Cir.1992); *Florida Int'l Indem. Co. v. City of Metter, Ga.*, 952 F.2d 1297 (11th Cir.1992); *Polston v. Boomershine Pontiac-GMC Truck, Inc.*, 952 F.2d 1304 (11th Cir.1992); *Middle Ga. Neurological Specialists, P.C. v. Southwestern Life Ins. Co.*, 946 F.2d 776 (11th Cir.1991); *Ryan v. State Farm Mut. Auto. Ins. Co.*, 934 F.2d 276 (11th Cir.1991); *Miles v. Ashland Chem. Co., a Div. of Ashland Oil*, 924 F.2d 1026 (11th Cir.1991); *Prudential Commercial Ins. Co., a Subsidiary of Prudential Ins. Co. of Am. on Behalf of N.J. Auto Full Ins. Underwriting Ass'n v. Michigan Mut. Ins. Co.*, 924 F.2d 199 (11th Cir.1991); *Johnson Controls, Inc. v. Safeco Ins. Co. of Am.*, 913 F.2d 907 (11th Cir.1990); *Browning v. Maytag Corp.*, 902 F.2d 882 (11th Cir.1990).

to certification evidences, it is a useful adjudication tool. Only through certification can federal courts get definitive answers to unsettled state law questions. Only a state supreme court can provide what we can be assured are "correct" answers to state law questions, because a state's highest court is the one true and final arbiter of state law. From our perspective, state law is what the state supreme court says it is, and a state supreme court's pronouncements on the subject are binding on every state and federal judge. By contrast, when we write to a state law issue, we write in faint and disappearing ink: what we write does not bind any state court judge, and even as to the federal judges in this Circuit, once the state supreme court speaks the effect of anything we have written vanishes like the proverbial bat in daylight, only faster. For every reason that it is important to decide controlling issues correctly and definitively, certification of unsettled state law questions is important.

Certification is especially important here, because this case "present[s] difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in [this] case." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). The difficulty of the unsettled state law questions in this case is evident from the fact that this Court is sharply divided over those questions. Six judges answer the state law questions one way, and four judges answer those questions the other way. Likewise, the public importance of the questions transcends the result in this one case. The inmate plaintiff has been released already, anyway, see majority op. at 1498 n. 5, but the decision in

this case will determine when scores, if not hundreds, of other Georgia prison inmates will be released. The operation of the Georgia prison system – including the determination of which inmates will be released on parole and when – is a matter of utmost importance to the State of Georgia and all of its people.

The Court's unwillingness to certify the important state law questions in this case stands in sharp contrast to its willingness to certify questions of far less public importance in previous cases. The following are some examples of questions this Court has thought sufficiently important to certify to the Georgia Supreme Court in recent cases:

> Under the facts of this case, when the insurance policy application established the policy's delivery to and acceptance by the applicant as a condition precedent to the formation of the insurance contract, but the issued policy specified a date certain on which coverage was said to be effective and from which future premium payments were to be calculated, is the failure of actual delivery of the policy of insurance fatal to contract formation so as to render the coverage ineffective?

Middle Georgia Neurological Specialists v. Southwestern Life Insurance Co., 946 F.2d 776, 779-80 (11th Cir.1991).

> Whether the insured's tardy forwarding of suit papers is cured by the plaintiff's voluntary dismissal and refiling of an identical lawsuit; or, can the insurer rely on the tardy forwarding in the first suit to avoid liability even though the insured immediately forwarded the papers served in the second suit.

Granite State Insurance Co. v. Nord Bitumi U.S., Inc., 959 F.2d 911, 915 (11th Cir.1992).

> Whether, with respect to a automobile insurance policy which covers vehicles principally garaged and used in another state but which is sold and delivered to a resident of Georgia, O.C.G.A. § 33-7-11 acts to invalidate an underinsured coverage exclusion which attempts to limit coverage because the insured was injured in a vehicle not covered by the policy.

Amica Mutual Insurance Co. v. Bourgault, 979 F.2d 187, 190 (11th Cir.1992). Every case matters to the parties, and we should do our utmost to decide every case correctly. Even so, the state law questions involved in this case, and the proper decision of this case, are of greater public import than most, if not all, of the questions that we have certified to the Georgia Supreme Court in the past.

Another reason we should allow the Georgia Supreme Court to answer the unsettled questions of state law upon which this case turns is that the questions involve the division of power and authority between the Georgia Legislature and the Georgia Board of Pardons and Paroles, an executive agency. The way in which a state allocates powers between the executive and legislative branches of its government is a decision of the most fundamental sort for that state; it goes to the very " 'heart of representative government.' " *Gregory v. Ashcroft*, 501 U.S. 452, 458-61, 111 S.Ct. 2395, 2400-01, 115 L.Ed.2d 410 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973)). "Through the structure of its government, and the character of those who exercise governmental authority, a State defines

itself as a sovereign." *Id.* 501 U.S. at 460, 111 S.Ct. at 2400. We ought to leave to the Georgia Supreme Court the business of interpreting Georgia legislation that may, or may not, effectively curtail the power of an executive agency that is specifically provided for in the Georgia Constitution. We need not, and we should not, get involved in deciding how Georgia has distributed its sovereign powers among the branches of its government. The majority and the other dissenters do just that by venturing to answer unsettled questions about whether the two Board-adopted provisions conflict with the relevant statute, a matter which has implications sounding in Georgia constitutional law.

If the Georgia parole guidelines statute does prohibit the Board from adopting Rule 475-3-.05 and Annexure 2, as four members of this Court believe, then a question arises as to whether that legislative restriction on the Board's discretion violates Georgia's Constitution. The Georgia Constitution authorizes the Board to grant paroles, but allows the legislature to limit the Board's discretion in certain enumerated circumstances, none of which are relevant here. GA. CONST. art. 4, § 2, ¶ 2. It may be that any other legislative limitation on the Board's discretion, such as requiring it to adopt and employ a set of parole guidelines based on legislatively enumerated criteria, violates the separation of powers clauses of the Georgia Constitution. *See id.* art. 4, § 7, ¶ 2; *id.* art. 1, § 2, ¶ 3. Maybe not. The Georgia courts have not squarely addressed the constitutionality of the parole guidelines statute. *Compare Charron v. State Bd. of Pardons & Paroles*, 253 Ga. 274, 319 S.E.2d 453, 455 (1984) (holding that "an independent Board of Pardons and Paroles is

envisioned under our State Constitution," and suggesting that substantive legislative limits on the Board's discretion would be unconstitutional) *and Stephens v. State*, 207 Ga.App. 645, 428 S.E.2d 661, 663 (1993) (holding that a sentencing court's attempt to impose conditions on a criminal defendant's parole unconstitutionally infringed on the Board's authority) *with Freeman v. State*, 264 Ga. 27, 440 S.E.2d 181, 184 (1994) (holding that a statute authorizing a sentence of "life without parole" did not unconstitutionally infringe on the Board's discretion). The existence of that state constitutional question, which lurks in the shadows of this case, is another reason we should let the Georgia Supreme Court decide the state law issues.

To the casual reader it will appear that Sultenfuss, or the inmates for whom he is a proxy, are the losers in this case. They are, but they are not the only ones who have lost. The people of Georgia and the principles of federalism also have lost. The people of Georgia have lost some measure of their right to govern themselves, because close and important issues of their state law have been decided not by the court they have established as supreme in such matters, but instead by a federal court which should have deferred to their supreme court. Federalism has lost because some well-meaning federal judges have determined important matters involving Georgia's government that could and should have been left to the state and its supreme court. It sometimes seems as though we federal judges treat federalism like the flag. We salute it, pledge allegiance to it, and like to talk about how important it is. However, in popular parlance: it's easy to talk the talk, but the time has come to walk the walk. Because the Court fails to do so, I dissent.

CLARK, Senior Circuit Judge, dissenting, in which KRAVITCH, HATCHETT and BARKETT, Circuit Judges, join:

Introduction

The majority errs in denying due process to Georgia prisoners entitled to parole consideration. The court fails to follow controlling United States Supreme Court precedent. Then, it holds that a Georgia administrative agency (the Parole Board) can ignore a controlling statute passed by the Georgia legislature.

The Supreme Court, as will be discussed below, has unequivocally held that a state by legislative action may create a due process right in its parole system. A state does not have to establish a parole system; when it does, it may elect whether to provide for due process protection or leave parole to the unguided discretion of the paroling authority, who may be the Governor, an agency appointed by the Governor, or an agency staffed as prescribed by the legislature.

Due process protects prisoners entitled to parole consideration from decisions of a paroling authority mistakenly made, infected by discrimination or lack of equal protection, resulting from bribery or political influence, or from some other unjustifiable cause. Due process provides protection from unaccountable arbitrary action on the part of government (invisible people), which is what this country is all about.

Some of these evils led the Governor and legislature of Georgia in 1980 to change the existing system. For

reasons not clear, the majority of the court decides to ignore the unequivocal change made in the 1980 law (O.C.G.A. § 42-9-40). The majority holds that the Parole Board has the same unbridled and arbitrary discretion that it had before the 1980 legislation.

The 1980 statute *mandates* implementation of a parole guidelines system, *mandates* the specified criteria that the system must take into consideration, and *mandates* use of the system in determining parole actions. In response to the mandates of O.C.G.A. § 42-9-40, the Board promulgated Guidelines that *require* application of *particularized criteria,* which determine an inmate's Tentative Parole Month. The Guidelines describe the Tentative Parole Month as the month *"during which the offender may expect to be released."*[1] Notwithstanding the mandatory language, the particularized criteria that guide decisionmaking, and the explicit language of expectancy of release, the majority concludes that the Georgia parole scheme does not give rise to a liberty interest in parole. In so concluding, the majority makes three fundamental mistakes, which I discuss separately below. First, the majority fails to compare the Georgia parole scheme with the parole schemes at issue in the two seminal Supreme Court cases, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,*[2] and *Board of Pardons v. Allen.*[3] Such a comparison demonstrates that the Georgia parole scheme necessarily creates

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[1] Parole Decision Guidelines System ¶ 8-27.01 (emphasis added).

[2] 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

[3] 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987).

a liberty interest in parole. Second, the majority erroneously interprets O.C.G.A. § 42-9-42 as a presumption against parole, rather than as a further indication of the legislative intent to cabin the discretion of the Board. Finally, the majority erroneously defers to the Board's purported reservation of unfettered discretion to ignore the Guidelines for any reason or for no reason at all. The Board's position is nonsensical, patently unreasonable, and contrary to the history, the purpose, and the mandates of O.C.G.A. § 42-9-40. Accordingly, I dissent.

I. Under *Greenholtz* and Its Progeny, the Georgia Parole Scheme Creates a Liberty Interest In Parole

A state creates a protected liberty interest "by placing substantive limitations on official discretion."[4] The most common means by which a state creates such an interest is "by establishing 'substantive predicates' to govern official decisionmaking, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met."[5] Thus, "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest."[6] The "substantive predicates" necessary to create a liberty interest have been described as

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[4] *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983).

[5] *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 462, 109 S.Ct. 1904, 1909, 104 L.Ed.2d 506 (1989) (citation omitted).

[6] *Hewitt v. Helms*, 459 U.S. 460, 472, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983).

" 'particularized standards or criteria [that] guide the State's decisionmakers.' "[7]

Greenholtz is the seminal case on liberty interests in parole. The Nebraska parole statute at issue in *Greenholtz* provided, in pertinent part:

> "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
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> "(a) There is a substantial risk that he will not conform to the conditions of parole;
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> "(b) His release would depreciate the seriousness of his crime or promote disrespect for the law;
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> "(c) His release would have a substantially adverse effect on institutional discipline; or
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> "(d) His continued treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date."[8]

The statute further provided a list of 15 factors that the Board was obligated to consider in reaching a parole decision. Factor number 15 read: "Any other factors the

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[7] *Olim*, 461 U.S. at 249, 103 S.Ct. at 1747 (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (Brennan, J., concurring)).

[8] 442 U.S. at 11, 99 S.Ct. at 2106 (quoting Neb.Rev.Stat. § 83-1,114(1) (1976)).

board determines to be relevant."[9] The Supreme Court concluded that this statute gave rise to an "expectancy in release"[10] protected by the due process clause.

Some years later, in *Board of Pardons v. Allen*, the Supreme Court passed upon the Montana parole statute, which provided, in pertinent part:

> "Prisoners eligible for parole. (1) Subject to the following restrictions, the board *shall* release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]
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> . . . .
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> "(2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen."[11]

Relying on the use of "mandatory language" and "substantive predicates," the Supreme Court concluded that this statute, like the Nebraska statute at issue in *Greenholtz*, created a liberty interest in parole. As further support for its conclusion, the Court pointed to the legislative history of the Montana statute: the statute quoted above was

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[9] *Id.* at 18-19, 99 S.Ct. at 2109 (appendix).

[10] *Id.* at 12, 99 S.Ct. at 2106.

[11] 482 U.S. at 376, 107 S.Ct. at 2420 (quoting Mont.Code Ann. § 46-23-201 (1985)) (alterations in original).

enacted in 1955 to replace a 1907 statute that had granted absolute discretion to the Board. The Court saw the 1955 change in the law as an "indication of a legislative intent to cabin the discretion of the Board."[12]

It is inconceivable that the Nebraska and Montana statutes at issue in *Greenholtz* and *Allen* create a liberty interest in parole while the Georgia parole scheme does not. The Georgia statute, which is entitled "Parole guidelines system," provides:

> (a) The board *shall* adopt, implement, and maintain a parole guidelines system for determining parole action. The guidelines system *shall* be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system *shall* be consistent with the board's primary goal of protecting society and *shall* take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.
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> (b) The guidelines system required by subsection (a) of this Code section shall be adopted by rules or regulations of the board. The rules or regulations shall be adopted in conformity with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."[13]

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[12] *Id.* at 381, 107 S.Ct. at 2422.

[13] O.C.G.A. § 42-9-40 (1991) (emphasis added).

Certainly the language of this statute is no less "mandatory" than that of the Nebraska or Montana statutes at issue in *Greenholtz* and *Allen*. The Georgia statute *mandates* implementation of a parole guidelines system, *mandates* use of the system in making parole decisions, and *mandates* the criteria that the system must take into consideration.

Likewise, the criteria that guide the Board's decision-making under the Georgia parole scheme are no less "particularized"[14] than the criteria in the Nebraska or Montana statutes at issue in *Greenholtz* and *Allen*. Under the Georgia scheme, the Board must arrive at each parole decision by following a step-by-step procedure. First, the Board must assign the inmate a Crime Severity Level, which is determined by reference to a table that lists dozens of specific crimes, with each crime assigned a level between I and VII.[15] Second, the Board must assign the inmate a Parole Success Likelihood Score. This score is calculated based on the following eight factors:

(a) Age at First Commitment;

(b) Prior Juvenile and Adult Convictions;

(c) Prior Incarcerations Since Age 17;

(d) Probation/Parole Failure;

(e) Use, Possession, or Attempt to Obtain Heroin or Opiate Drugs;

(f) Commitment Offense Involved Burglary or Forgery;

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[14] *Olim*, 461 U.S. at 249, 103 S.Ct. at 1747.

[15] Document entitled "Crime Severity Levels," R1-32 Exh. 3 Attach. B.

> (g) Fully Employed During the Six Months Prior to Current Offense.[16]

Each of these eight factors is designated a numerical scoring system designed to reflect the inmate's success or lack thereof as to that factor. The numerical scores for each of the eight factors are added together to arrive at the Parole Success Likelihood Score, which ranges from zero to 20.[17] Third, the Board must take the Crime Severity Level and the Parole Success Likelihood Score and apply the Parole Decision Grid to determine the number of months the inmate must serve:

> The [Parole Success Likelihood Score] *shall* be used in conjunction with the Crime Severity Level finally to determine a recommended number of months to serve from the Parole Decision Guidelines grid.
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> . . . .
>
> PAROLE DECISION GRID. The Parole Decision Grid is the final component of the Parole Decision Guidelines, the application of which determines the months-to-serve recommendation.[18]

As this detailed procedure demonstrates, the criteria that guide the Board under the Georgia scheme are far more detailed and particularized, and go much farther in limiting the Board's discretion, than the criteria in the Nebraska and Montana statutes at issue in *Greenholtz* and *Allen*. For example, under the Nebraska statute, the Board could consider "[a]ny . . . factors the board determines to

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[16] Parole Decision Guidelines System ¶ 8-17.03.

[17] *Id.* at ¶ 8-17.02 through ¶ 8-25.02.

[18] *Id.* at ¶ 8-17.02 and ¶ 8-26.01 (emphasis added).

be relevant,"[19] while the criteria set out in the Georgia statute and Guidelines grant the Board no such discretion. Likewise, the criteria in the Montana statute were very few and very general, thus permitting the Board far more discretion than the very particularized criteria in the Georgia scheme.

Finally, the Georgia Guidelines, like the Nebraska and Montana statutes, contain mandatory language that " 'creat[es] a presumption that parole release will be granted' when the designated findings are made."[20] The Guidelines provide:

> TENTATIVE PAROLE MONTH. The Tentative Parole Month, *during which the offender may expect to be released,* absent new information or other cause to cancel the Board's tentative release decision, *shall* be calculated by adding the recommended months-to-serve to the compute-from date of the controlling sentence.[21]

The *Greenholtz* decision turned upon the Supreme Court's finding that language of the Nebraska statute created an "expectancy of release" on parole.[22] The provision quoted above, coupled with the mandated procedure by which the Board must arrive at the recommended months-to-serve, creates more of an "expectancy of release" than the Nebraska and Montana statutes at issue in *Greenholtz* and

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[19] *Greenholtz*, 442 U.S. at 18-19, 99 S.Ct. at 2109 (appendix).

[20] *Allen*, 482 U.S. at 377-78, 107 S.Ct. at 2420 (quoting *Greenholtz*, 442 U.S. at 12, 99 S.Ct. at 2106).

[21] Parole Decision Guidelines System ¶ 8-27.01 (emphasis added).

[22] 442 U.S. at 12, 99 S.Ct. at 2106.

Allen. Other provisions in the Guidelines confirm this "expectancy of release." For example, in a section setting out the benefits of the system, the Guidelines provide: "*By eliminating the uncertainty of release dates,* inmate morale and sincere participation in rehabilitation programs is enhanced."[23] The Guidelines eliminate uncertainty by mandating that an inmate's Tentative Parole Month, *during which he may expect to be released,* be set by applying the Parole Decision Grid to the inmate's Crime Severity Level and Parole Success Likelihood Score. Thus, like the statutes at issue in *Greenholtz* and *Allen,* the Georgia parole written procedures use mandatory language that requires the Board to apply particularized criteria to arrive at a parole decision. Under *Greenholtz* and *Allen,* the Georgia scheme creates a liberty interest in parole.

The majority's reasoning is not grounded in the *Greenholtz* and *Allen* decisions. I give three specific examples. First, the majority begins its discussion of the Georgia parole system with the statement: "we must keep in mind that our analysis is inherently subjective."[24] The majority does not cite and I am not aware of any authority to support the proposition that a *Greenholtz*-type analysis is "inherently subjective." Under *Greenholtz* and its progeny, we must look to the language of the state parole scheme and determine whether that language

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[23] Parole Decision Guidelines System ¶ 8-2.01(b) (emphasis added).

[24] Majority Op. at 207.

places "substantive limitations on official discretion."[25] I see nothing "inherently subjective" in this analysis.

Second, the majority concedes that "the Guidelines provide a set of particularized criteria that the Board must consider in making parole determinations."[26] Nevertheless, the majority concludes that this "set of particularized criteria" does not indicate the existence of a liberty interest because "the Guidelines leave the Board significant discretion in applying the various factors. . . . The Guidelines do not envision the rote application of specific criteria and a predetermined outcome if those criteria are met."[27] In so concluding, the majority ignores the teaching of *Allen*, in which the Supreme Court distinguished between two types of discretion:

> In essence, the Court [in *Greenholtz*] made a distinction between two entirely distinct uses of the term discretion. In one sense of the word, an official has discretion when he or she "is simply not bound by standards set by the authority in question." R. Dworkin, Taking Rights Seriously 32 (1977). In this sense, officials who have been told to parole whomever they wish have discretion. In *Greenholtz*, the Court determined that a scheme awarding officials this type of discretion does not create a liberty interest in parole release. But the term discretion may instead signify that "an official must use judgment in applying the standards set him [or her] by

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[25] *Olim*, 461 U.S. at 249, 103 S.Ct. at 1747.

[26] Majority Op. at 207.

[27] *Id.* at 207.

> authority"; in other words, an official has discretion when the standards set by a statutory or regulatory scheme "cannot be applied mechanically." Dworkin, *supra*, at 31, 32; see also *id.*, at 69 ("[W]e say that a man has discretion if his duty is defined by standards that reasonable [people] can interpret in different ways"). The Court determined in *Greenholtz* that the presence of official discretion in this sense is not incompatible with the existence of a liberty interest in parole release when release is *required* after the Board determines (in its broad discretion) that the necessary prerequisites exist.[28]

The discretion upon which the majority relies in concluding that the "particularized criteria" in the Guidelines do not indicate the existence of a liberty interest is clearly the *second* type of discretion described by the Court in *Allen*. The majority fails to recognize that this type of discretion is *not* incompatible with the existent [sic] of a liberty interest. Just as a liberty interest may exist when "the standards set by a statutory or regulatory scheme 'cannot be applied mechanically,' "[29] so a liberty interest may also exist when "[t]he Guidelines do not envision the rote application of specific criteria. . . . "[30]

Finally, the majority fails to recognize the significance of the 1980 change in the Georgia law. In *Allen*, the Supreme Court relied on a change in the Montana parole statute to support its conclusion that the new statute

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[28] *Allen*, 482 U.S. at 375-76, 107 S.Ct. at 2419.

[29] *Id.* at 375, 107 S.Ct. at 2419.

[30] Majority Op. at 207.

created a liberty interest in parole. Noting that the old statute granted absolute discretion to the Board, the Court found that the new statute provided an "indication of a legislative intent to cabin the discretion of the Board."[31] Similarly, prior to 1980 in Georgia, there was no statutory requirement that the Board exercise its parole powers in accordance with any specific guidelines or regulations. The Georgia statutes did not place limits on the Board's discretion to determine when an eligible inmate was to be released on parole. In 1980, however, the Georgia legislature enacted O.C.G.A. § 42-9-40, thereby mandating that such parole determinations be made in accordance with a parole guidelines system. Under *Allen*, this change in the law is at least some indication of legislative intent to "cabin the discretion of the Board."[32]

The majority is able to reach the conclusion it does only by ignoring both the statutes at issue in *Greenholtz* and *Allen* and the teachings of those two cases. Under *Greenholtz* and its progeny, the Georgia parole scheme gives rise to an expectancy of parole that is protected by the due process clause.

II. O.C.G.A. § 42-9-42 Is Consistent with a Liberty Interest in Parole

The majority relies heavily on O.C.G.A. § 42-9-42, which it interprets as creating a "presumption *against*

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[31] 482 U.S. at 381, 107 S.Ct. at 2422.

[32] *Id.*

parole."[33] A cursory review of the Supreme Court's decision in *Allen* indicates that this interpretation is flawed. O.C.G.A. § 42-9-42 is very similar to a portion of the Montana statute at issue in *Allen*. O.C.G.A. § 42-9-42 provides, in part:

> No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society.

Similarly, the Montana statute at issue in *Allen* provided, in part:

> A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.[34]

O.C.G.A. § 42-9-42 further provides, in part:

> [N]o person shall be released on pardon or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge.

Similarly, the Montana statute provided, in part:

> A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon.[35]

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[33] Majority Op. at 208.

[34] 482 U.S. at 376, 107 S.Ct. at 2420 (quoting Mont.Code Ann. § 46-23-201 (1985)).

[35] *Id.*

The Supreme Court in *Allen* did *not* read the Montana statute as creating a presumption against parole. To the contrary, it read the portions of the statute quoted immediately above as a further constraint on the discretion of the Board, preventing a decision in favor of release when a prisoner is unable "to fulfill the obligations of a law-abiding citizen."[36] Likewise, O.C.G.A. § 42-9-42 can only be interpreted as a further constraint on the discretion of the Board, *not* as a presumption against release. Consistent with the purpose and intent of the Georgia parole guidelines system, O.C.G.A. § 42-9-42 prohibits the Board from releasing a prisoner who cannot "live and conduct himself as a respectable and law-abiding person." Thus, O.C.G.A. § 42-9-42 is compatible with the liberty interest in parole created by the Georgia parole scheme. Any other conclusion flies in the face of the Supreme Court's decision in *Allen*.

III. The Board's Position that It Retains Absolute Authority to Ignore the Guidelines is Contrary to the History, the Purpose, and the Mandates of the Georgia Parole Guidelines System

In addition to O.C.G.A. § 42-9-42, the majority also relies heavily on Georgia Rule 475-3-.05(5) and on a portion of the Guidelines that the majority refers to as Annexure 2. Relying solely on these two provisions, the majority states that "several of the rules and regulations

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[36] *Id.* at 380, 107 S.Ct. at 2421.

expressly provide for departure [from the grid recommendation]."[37] The majority is correct to the extent that Georgia Rule 475-3-.05(5) purports to reserve the Board's discretion to "disagree" with the Guidelines, and Annexure 2 purports to reserve the Board's decision to "depart" from the Guidelines.[38] Nevertheless, neither of these provisions nor any other provision in the Guidelines even mention either a procedure to follow or criteria to consider in effecting such a departure. Thus, the Board purports to reserve for itself the discretion to make a decision independent of the Guidelines, that is, to simply ignore the Guidelines, for any reason or for no reason at all. I cannot accept, as the majority does, the Board's expansive interpretation of its own discretionary powers.

The Board's position, when considered in the context of the Georgia parole scheme as a whole, is nonsensical. The Georgia legislature, with O.C.G.A. § 42-9-40, mandated that the Board implement and use Guidelines that take into consideration certain specified factors. The Guidelines promulgated pursuant to this mandate set out a detailed procedure, including the application of numerous particularized criteria, by which the Board must arrive at an inmate's Tentative Parole Month. The Guidelines also set out a procedure by which the Board may adjust the Tentative Parole Month prior to an inmate's release; such adjustments may be based on the inmate's institutional behavior or on new information not

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[37] Majority Op. at 202; *see also id.* at 209.

[38] These two provisions also set out the Board's opinion that the Georgia Parole Guidelines System does not create a liberty interest in parole.

previously available.[39] *The Guidelines do not, however, provide a procedure for departures.* That is, there is absolutely nothing in the Guidelines to indicate when or how the Board is to go about disagreeing with, or departing from, the Tentative Parole Month. Neither do the Guidelines indicate what factors or criteria the Board should consider in determining whether departure is appropriate. Rather, the Guidelines simply declare, in Annexure 2, that "the Board may depart from the Guidelines recommendation and made an independent decision . . . . " It is inconceivable that the Georgia legislature intended to establish a detailed and particularized system for arriving at an inmate's Tentative Parole Month, "during which the offender may expect to be released,"[40] only to grant the Board the unfettered discretion to completely disregard the system.

Other provisions of the Guidelines are inconsistent with the Board's position that it has unfettered discretion to depart. For example, the Guidelines provide a procedure by which an inmate may request reconsideration of his months-to-serve calculation.[41] The Guidelines specifically provide, however, that such requests "are limited to alleged errors in the Crime Severity Level and/or the Parole Success Factor scores:"[42] Thus, under the Guidelines, an inmate may request reconsideration of the two factors that determine his Tentative Parole Month, but he

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[39] Parole Decision Guidelines System ¶¶ 8-4.01, 8-8.01(c), 8-30.01 through 8-32.01.

[40] *Id.* at ¶ 8-27.01.

[41] *Id.* at ¶¶ 8-29.01 through 8-29.04.

[42] *Id.* at ¶ 5.2.

may not request reconsideration or otherwise contest the Board's decision to depart from this Tentative Parole Month. It makes no sense to provide a procedure for contesting the determination of the Tentative Parole Month but not provide for contesting the decision to depart therefrom.

Another example of the Guidelines' incompatibility with the Board's position is ¶ 8-12.01, which provides that an inmate's Crime Severity Level shall be determined "based on actual convictions of record, without reference to original arrest or booking charges, or *allegations in accusations or indictments for which an actual conviction was not obtained.*"[43] Notwithstanding this provision, it is the Board's position that it may consider *any* information in deciding, in its unfettered discretion, whether to depart from the Guidelines. Sultenfuss is a case in point. On Sultenfuss's parole rating summary sheet are the following comments:

> [M]ajor drug dealer of cocaine in Macon for years and always claims entrapment. Will have numerous lawyers telling us he's a great fellow. Paroled on cocaine charges revoked based on new cocaine charge received maximum sentence of 15 years to serve. This is a small quantity case which is out of character for him.[44]

Thus, the Board certainly considered "accusations . . . for which an actual conviction was not obtained" in reaching its decision to depart from the Guidelines in Sultenfuss's

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[43] *Id.* ¶ 8-12.01 (emphasis added).

[44] R1-33 Exh. 1 Attach. A.

case. To prevent the Board from considering certain information during the calculation of the Tentative Parole Month, when the inmate may challenge the information, but then permit the Board to consider the very same information during the departure decision, when the inmate has no recourse, defies logic and common sense. The Board's interpretation of its own discretion is contrary to the construction of the Guidelines as a whole.

The Board's position is completely at odds with the history and the purpose of the 1980 change in Georgia law governing parole decisions. A bit of background here is helpful.[45] In 1978, a federal investigation disclosed widespread corruption in the Tennessee parole system. The scandal reached the Governor, Ray Blanton, and three individuals from his office were eventually convicted of accepting bribes for influencing the granting of pardons and paroles.[46] As this scandal became national

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[45] The newspaper articles to which references are made in footnotes 47-53 are not a part of the record in this case. The Georgia legislature does not maintain a Legislative History. It is not uncommon for a court to refer to a newspaper article which contains news about the subject upon which the court is writing. *Cf. Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, ___ n. 11, 112 S.Ct. 2608, 2616 n. 11, 120 L.Ed.2d 407 (1992), which states:

> For example, the California State Senate passed a total ban on both print and electronic cigarette advertisements. "California Senate Votes Ban On Cigarette Advertising," Washington Post, June 26, 1969, p. A9.

See also Yeager v. City of McGregor, 980 F.2d 337, 341 nn. 2, 4 & 5 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 79, 126 L.Ed.2d 47 (1993).

[46] *See United States v. Thompson*, 685 F.2d 993 (6th Cir.) (en banc), *cert. denied*, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 635 (1982).

news, the institution of parole came "under siege."[47] Some suggested abolishing parole altogether, while others suggested strengthening the standards that govern the way parole boards operate.[48]

A year later, in 1979, the Georgia Board of Pardons and Paroles was widely criticized for a number of its decisions.[49] One of the Board's decisions even led to a grand jury investigation of the Board's actions and, later, to a state court ruling that certain Board proceedings were unconstitutional.[50] Specifically, the state court held

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[47] Marie F. Ragghianti, *Is Parole Still a Workable Concept*, N.Y. Times, April 4, 1986, at A31.

[48] *See id.*

[49] *See* Sam Hopkins, *'We're Misunderstood,' Parole Chief Complains*, Atlanta Constitution, May 8, 1979, at C1, C3 (reporting criticism of Board's decision to parole Gary Steven Krist, who was convicted of kidnapping Florida heiress Barbara Jane Mackle and burying her alive for 83 hours); Gail Epstein, *Morris Defends Parole, 'Spider' Suspect Released in '76*, Atlanta Constitution, May 16, 1979, at C1, C4 (reporting rape charges against suspect whom Board had released from prison three years earlier); *Angry DA to Prosecute State Board of Paroles*, Atlanta, Constitution, Oct. 21, 1979, at B3 (reporting district attorney's anger over Board's decision to commute sentence of prisoner convicted of theft).

[50] *Angry DA to Prosecute State Board of Paroles*, Atlanta Constitution, Oct. 21, 1979, at B3 (reporting district attorney's intent to prosecute members of the Board over decision to commute sentence of William Hubbard); Steve Johnson, *Jury Will Probe Pardons Board*, Atlanta Constitution, Oct. 30, 1979, at C1, C2 (reporting grand jury investigation of action of Board in reducing sentence of William Hubbard); *Erase Parole Board Powers, D.A. Urges*, Atlanta Constitution, Nov. 16, 1979, at C2 (reporting motion filed by district attorney asking superior court judge to declare actions of the Board unconstitutional); *Judge Questions*

that the Board must cease its practice of conducting secret proceedings.[51]

In 1980, in the wake of the Tennessee scandal and the controversies over the Georgia Board's decisions, the Georgia legislature enacted O.C.G.A. § 42-9-40, mandating that the Georgia Board establish and use a guidelines system in rendering parole decisions. This new system was touted as a "scientific approach" to parole decisions. A contemporaneous newspaper report reads:

> Gov. George Busbee announced Thursday that a new "scientific approach" will be implemented to help determine whether inmates in Georgia prisons ought to be paroled, thus avoiding the controversy that surrounded such paroles as the recent release of convicted kidnapper Gary Steven Krist.
>
> "No longer," said Busbee, "will the parole board's decision-making process be a myth to the public. . . . The (new) parole rating guidelines will bring the Pardons and Paroles Board into the 20th Century."
>
> . . . .
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> "The parole rating guidelines will fulfill two critical needs in the criminal justice system," said the governor. "It will bring about greater fairness, consistency and openness in the parole

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Panel's Authority, Atlanta Constitution, Nov. 19, 1979, at C1, C2 (reporting hearing before superior court judge on district attorney's motion).

[51] *Board Stripped of Shroud of Secrecy, Extensive Effect Likely in Ruling on Parole Panel*, Atlanta Constitution, March 23, 1980, at B11.

> decisions-making process and will allow us to expand the use of paroles as an alternative to incarceration."
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> . . . .
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> The new program will involve "the careful development of two charts as grids," Busbee explained.
>
> "One chart – the crime-severity index – will rank in fine detail the seriousness or severity of each category of crime as determined by input from board members. The second chart takes into account social factors, including work history and criminal history, which serve as indicators of the offender's chance for success on parole," he said.
>
> Once in place, the criteria used in making decisions will be available for public review, the governor said. This will increase "the credibility of the system," he said.[52]

Publicly, at least, the Board purported to embrace the new guidelines system as a means to repair its tainted image. Another contemporaneous newspaper report reads:

> To repair its image, the board set about codifying its parole procedures. Reviews of past cases had revealed wide disparities in the board's decisions. "We were not the most consistent people in making decisions," [board director] Morris said. "As we looked at cases we would find that, for example, a person serving

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[52] Beau Cutts, *"Scientific" Parole Plan Aired*, Atlanta Constitution, May 18, 1979, at C1, C4.

> for an offense would be paroled. Four months later, a person serving for the same offense with the same background would not be paroled."
>
> To deal with charges of capriciousness, the board and its staff . . . began developing a new way of dealing with the cases. Advertised as a "scientific" way of managing parole, the plan took effect in January.[53]

Thus, by mandating the implementation and use of the guidelines system, the legislature intended to prevent the perversion of the system that had occurred in Tennessee and instill public confidence in the Georgia Board by insuring that parole decisions were made equitably, objectively, and openly. This intent is embodied in the Guidelines. For example, ¶ 8-1.02 provides, in pertinent part:

> The Parole Decision Guidelines System shall be utilized to promote the following policy goals of this Board:
>
> (a) Objective and equitable use of the clemency power in determining appropriate lengths of imprisonment for individual inmates;
>
> (b) Equitable and consistent terms of imprisonment for all inmates sharing similar personal behavior histories and convictions for similar crimes. . . .

The Board's position that it retains unfettered discretion to depart from the Guidelines for any reason or for no reason at all is at odds with these stated goals. Rather

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[53] Chester Goolrick, *Either Way, Potts Decision Likely to Stir Controversy,* Atlanta Constitution, April 30, 1980, at C1, C2.

than encouraging equitable, objective, and consistent decisions under the guidelines system, the Board's position permits arbitrary departures.

By enacting O.C.G.A. § 42-9-40, the Georgia legislature mandated that the Board implement the guidelines system and *use* the system in determining parole actions. The majority concludes that the Board's position is not inconsistent with this mandate because "[t]he Board's decision to depart from the grid recommendation does not mean that the Guidelines were not *used* in determining parole action."[54] The majority fails to acknowledge, however, that under the Board's interpretation, the Guidelines are meaningless. If the Board has the unfettered discretion to arbitrarily depart from the Guidelines, then the Guidelines play no meaningful role in the final parole decision; and if the Guidelines play no meaningful role in the decision, they are not "used in determining parole actions" as mandated by the statute. The Board's purported retention of unfettered discretion to arbitrarily depart from the Guidelines, *without notice or response from the inmate,* is nothing more than a cavalier attempt to avoid the mandate of the Georgia legislature.

This purported retention of discretion is not the only cavalier response the Board has had to the legislature's mandate. O.C.G.A. § 42-9-40(b) specifically requires that the guidelines system be adopted by rules or regulations of the Board and that these rules or regulations "be adopted in conformity with Chapter 13 of Title 50, the 'Georgia Administrative Procedure Act.' " Under the

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[54] Majority Op. at 207.

Georgia Administrative Procedure Act, the Secretary of State "shall compile, index, and publish all rules adopted by each agency. . . . "[55] Rules may be omitted from the Secretary of State's official compilation *provided* the "compilation contains a notice stating the general subject matter of rules so omitted and stating how copies thereof may be obtained."[56] Notwithstanding these requirements, the Guidelines discussed in this opinion are not published in the Secretary of State's official compilation of rules, and there is no notice "stating how copies thereof may be obtained." It is the Board's position that the Guidelines are a part of an "internal operating manual"[57] that has not been made available to this court for review. By failing to make the Guidelines available to the public as mandated by law, the Board does nothing to dispel the stereotype of the parole board as a shadowy body making arbitrary and capricious decisions outside the realm of public scrutiny.

While an agency's interpretation of a statute it is charged with implementing is entitled to deference, "administrative construction should be restricted to cases in which the meaning of the statute is really doubtful and must be disregarded where its invalidity is apparent."[58] Here, the Board's self-serving interpretation of the Georgia parole scheme is contrary to the Georgia statute and, therefore, invalid. The majority errs in deferring to the

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[55] O.C.G.A. § 50-13-7(a).

[56] O.C.G.A. § 50-13-7(c).

[57] Majority Op. at 201 n. 1.

[58] *Mousetrap of Atlanta, Inc. v. Blackmon*, 129 Ga.App. 805, 201 S.E.2d 330, 332 (1973).

Board instead of following the law established by the Georgia legislature.

IV. Conclusion

Under *Greenholtz* and its progeny, the language of the Georgia parole statutes and Guidelines creates a liberty interest in parole. Nothing in the Georgia parole scheme is inconsistent with this liberty interest *except* the Board's self-serving attempt to reserve for itself the unfettered discretion to arbitrarily depart from the Guidelines. The Board's interpretation is without any basis; indeed, it is contrary to the mandates of the Georgia legislature and is, therefore, entitled to no deference. I dissent.

Stephen SULTENFUSS,
Plaintiff-Appellant.

Charles McMulling, et al., Plaintiffs,

v.

Wayne SNOW, Jr., James T. Morris, Mobley Howell, Michael H. Wing, Bettye O. Hutchings, Michael J. Bowers, Defendants-Appellees.

No. 91-8002.

United States Court of Appeals,
Eleventh Circuit.

Feb. 4, 1994.

Jill A. Pryor, Bondurant Mixon [sic] & Elmore, Atlanta, GA, for plaintiff-appellant.

Terry L. Long, Atlanta, GA, for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia (No. 1:88-CV-1563-GET), G. Ernest Tidwell, Judge.

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

(Panel Opinion November 3, 1993, 11th Cir., 1993, 7 F.3d 1543)

Feb. 4, 1994.

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, COX, BIRCH, DUBINA, BLACK and CARNES, Circuit Judges.*

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*Judge J.L. Edmondson has recused himself and will not participate. Senior U.S. Circuit Judge Thomas A. Clark has

BY THE COURT:

A member of this court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges of this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

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elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

Stephen SULTENFUSS,
Plaintiff-Appellant,

Charles McMulling, et al., Plaintiffs,

v.

Wayne SNOW, Jr., James T. Morris, Mobley Howell, Michael H. Wing, Bettye O. Hutchings, Michael J. Bowers, Defendants-Appellees.

No. 91-8002.

United States Court of Appeals,
Eleventh Circuit.

Nov. 3, 1993.

Inmates brought civil rights action alleging that Georgia Board of Pardons and Paroles had violated their constitutional rights by departing from guideline recommendations and setting their parole release dates. The United States District Court for the Northern District of Georgia, No. 1:88-CV-1563-GET, dismissed complaint, and inmate appealed. The Court of Appeals, 894 F.2d 1277, remanded for further proceedings regarding due process claim. The District Court, G. Ernest Tidwell, J., entered summary judgment against inmate, and inmate appealed. The Court of Appeals, Clark, Senior Circuit Judge, held that Georgia parole statutes created liberty interests protected by due process clause.

Reversed and remanded.

Pittman, Senior District Judge, sitting by designation, filed separate opinion concurring in part and dissenting in part.

Jill A. Pryor, Bondurant Mixon & Elmore, Atlanta, GA, for plaintiff-appellant.

Terry L. Long, Atty Gen., Atlanta, GA, for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, Circuit Judge, CLARK, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

CLARK, Senior Circuit Judge:

This litigation was initiated by appellant Stephen G. Sultenfuss and several other Georgia state inmates alleging that the chairman and members of the Georgia Board of Pardons and Paroles had violated the inmates' constitutional rights by departing from the parole guideline scheme in setting parole dates. On a previous appeal, we remanded this case to the district court to determine whether the current Georgia parole system, as modified following the 1980 legislation mandating adoption and application of a parole guideline system, gives rise to a liberty interest in parole.[1] On remand, the district court concluded that the current system does not create a liberty interest in parole. We disagree. Having carefully reviewed the Georgia statutes and guidelines governing parole, we hold that the current Georgia parole system creates a liberty interest protected by the due process

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*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

[1] *Sultenfuss v. Snow*, 894 F.2d 1277 (11th Cir. 1990).

clause. Accordingly, we reverse the district court's decision and remand the case for further proceedings.

I. *BACKGROUND FACTS*

Appellant Stephen G. Sultenfuss was convicted of two separate drug charges. He received two sentences, the longest of which is 15 years, calculated from August 24, 1986. This sentence expires on August 23, 2001. Applying the Georgia Parole Decision Guidelines, the Georgia Board of Pardons and Paroles assigned Sultenfuss a Parole Success Likelihood Score of 11, which is classified as "good," and a Crime Severity Level of II, on a scale of VII. The Parole Decision Grid indicated that an inmate with a Parole Success Likelihood Score of 11 and a Crime Severity Level of II should serve 10 months in prison. Nevertheless, in Sultenfuss's case, the Parole Board departed from the Grid recommendation and assigned Sultenfuss a 62-month incarceration period before parole.

Sultenfuss, along with several other Georgia inmates, filed this action pursuant to 42 U.S.C. § 1983 alleging that the Parole Board had violated their rights under the due process and equal protection clauses by departing from the Parole Decision Grid recommendation in setting their parole release dates. The inmates sought both injunctive and declaratory relief and compensatory damages. The district court *sua sponte* dismissed the inmates' complaint as frivolous pursuant to 28 U.S.C. § 1915(d). Relying on *Slocum v. Georgia State Board of Pardons and Paroles*,[2] the

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[2] 678 F.2d 940 (11th Cir.), *cert. denied*, 459 U.S. 1043, 103

district court held that the Georgia parole system did not create a liberty interest in parole protected by the due process clause and, therefore, that the inmate's due process claim was frivolous. As to the equal protection claim, the district court determined that the inmates had failed to state a claim upon which relief could be granted because they had failed to allege that other prisoners similarly situated had been granted parole.[3] Only Sultenfuss perfected an appeal from the district court's *sua sponte* dismissal of the complaint.

On appeal, we affirmed the district court's dismissal of Sultenfuss's claim for compensatory damages, but reversed the district court's dismissal of Sultenfuss's complaint for equitable relief.[4] We acknowledged that *Slocum* held that the extant Georgia statutes governing parole did not create a liberty interest in parole, but we noted that *Slocum* addressed parole decisions made under the Georgia system as it existed in 1979 and 1980 and that, since that time, the Georgia parole system had been revised significantly. We concluded that the changes to the Georgia parole system were sufficiently significant to raise an arguable question of law as to whether the new system created a liberty interest in parole. Accordingly, we remanded the case for further proceedings.

S.Ct. 462, 74 L.Ed.2d 612 (1982).

[3] *See Damiano v. Florida Parole and Probation Commission*, 785 F.2d 929, 932 (11th Cir.1986) (disparate treatment claim requires showing, first, that similarly situated inmates were not similarly treated and, second, that prison officials engaged in invidious discrimination based on race, religion, national origin, poverty, or some other constitutionally protected interest).

[4] *Sultenfuss*, 894 F.2d at 1279.

On remand, the district court appointed counsel to represent Sultenfuss, and counsel filed a restated complaint on Sultenfuss's behalf. The State answered and filed a motion for summary judgment, arguing that the current Georgia parole system does not create a liberty interest in parole. The district court agreed and granted the motion for summary judgment.[5] Sultenfuss filed this appeal.

II. *DISCUSSION*

A. *Creation of a Liberty Interest*

In *Greenholtz v. Nebraska Penal Inmates*,[6] the Supreme Court held that the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release. The Supreme Court went on to hold, however, that a state statute governing parole release may create an "expectation of parole" protected by the due process clause.[7] Since *Greenholtz*, the Supreme Court has on several occasions addressed whether state laws and regulations create an enforceable liberty interest

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[5] The district court's order granting summary judgment fails to mention Sultenfuss's equal protection claim. Nevertheless, we find no reversible error in the district court's treatment of this claim. Although Sultenfuss pled the equal protection claim in his restated complaint, he made no attempt to allege that similarly situated inmates were treated differently. *See Damiano*, 785 F.2d at 932. Moreover, Sultenfuss failed to even mention his equal protection claim in response to the state's motion for summary judgment.

[6] 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

[7] 442 U.S. at 11, 99 S.Ct. at 2106.

in the prison setting. For example, in *Connecticut Board of Pardons v. Dumschat*,[8] the Supreme Court held that the Connecticut statute governing commutation of prison sentences does not create a liberty interest; in so holding, the Court said: "The statute imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board."[9] Similarly, in *Olim v. Wakinekona*,[10] the Supreme Court held that Hawaii's prison regulations governing prison transfers do not create a liberty interest:

> The[] cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." If the decisionmaker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," the State has not created a constitutionally protected liberty interest.
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> Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause.[11]

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[8] 452 U.S. 458, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981).

[9] 452 U.S. at 466, 101 S.Ct. at 2465.

[10] 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983).

[11] *Id.* at 249, 103 S.Ct. at 1747 (citations omitted).

On the other hand, in *Board of Pardons v. Allen*,[12] the Supreme Court determined that the Montana parole statute does create a liberty interest in parole. This statute provides, in pertinent part, that the parole board " '*shall* release on parole [any inmate] when in [the board's] opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community.' "[13] In reaching its conclusion that this statute creates a liberty interest, the Court focused on the statute's mandatory language: "Significantly, the Montana statute . . . uses mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made."[14] The Court recognized that the Montana statute grants the parole board very broad discretion, but nevertheless held that this discretion was not incompatible with the existence of a liberty interest. The Court explained:

> The Court thus held in *Greenholtz* that the presence of general or broad release criteria – delegating significant discretion to the decisionmaker – did not deprive the prisoner of the liberty interest in parole release created by the Nebraska statute. In essence, the Court made a distinction between two entirely distinct uses of the term discretion. In one sense of the word, an official has discretion when he or she "is simply not bound by standards set by the authority in question." R. Dworkin, Taking Rights Seriously

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[12] 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987).

[13] *Id.* at 376, 107 S.Ct. at 2420 (quoting Mont. Code Ann. § 46-23-201 (1985), with emphasis added).

[14] *Id.*, U.S. at 377-78, 107 S.Ct. at 2420 (footnote omitted) (quoting *Greenholtz*, 442 U.S. at 12, 99 S.Ct. at 2106).

> 32 (1977). In this sense, officials who have been told to parole whomever they wish have discretion. In *Greenholtz*, the Court determined that a scheme awarding officials this type of discretion does not create a liberty interest in parole release. But the term discretion may instead signify that "an official must use judgment in applying the standards set him [or her] by authority"; in other words, an official has discretion when the standards set by a statutory or regulatory scheme "cannot be applied mechanically." Dworkin, *supra*, at 31, 32; see also *id.*, at 69 ("[W]e say that a man has discretion if his duty is defined by standards that reasonable [people] can interpret in different ways"). The Court determined in *Greenholtz* that the presence of official discretion in this sense is not incompatible with the existence of a liberty interest in parole release when release is *required* after the Board determines (in its broad discretion) that the necessary prerequisites exist.[15]

Thus, even a grant of broad discretion may give rise to a liberty interest if the decisionmaker is required to apply "standards set him [or her] by authority." For example, in *Hewitt v. Helms*,[16] the Supreme Court held that Pennsylvania prison regulations governing confinement in administrative segregation create a liberty interest in remaining in the general prison population. In so holding, the Court focused on the required application of certain procedural guidelines:

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[15] *Id.*, at 375-76, 107 S.Ct. at 2419.

[16] 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

> [I]n this case the Commonwealth has gone beyond simple procedural guidelines. It has used language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed, see n. 6 *supra*, and that administrative segregation will not occur absent specified substantive predicates, viz. "the need for control," or "the threat of a serious disturbance." . . . [O]n balance we are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest.[17]

These decisions indicate that, even when a statute grants the decisionmaker very broad discretion, the statute may nevertheless create a liberty interest if it channels the decisionmaker's discretion by requiring the application of certain standards or guidelines. In a recent decision, after discussing these precedents regarding the creation of a liberty interest in the prison setting, the Supreme Court said: "In sum, the use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the State has created a liberty interest."[18]

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[17] *Id.*, at 471-72, 103 S.Ct. at 871.

[18] *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989) (holding that Kentucky prison regulations do not give inmates a liberty interest in receiving visitors) (quoting *Hewitt v. Helms*, 459 U.S. at 472, 103 S.Ct. at 871).

B. ***The Georgia Parole System***

The Georgia Constitution provides that the State Board of Pardons and Paroles "shall be vested with . . . the powers to grant reprieves, pardons, and paroles. . . . "[19] Prior to 1980, there was no statutory requirement that the Board exercise this power in accordance with any specific guidelines or regulations. In 1980, however, the Georgia legislature enacted O.C.G.A. § 42-9-40. This statute, which is entitled "Parole guideline system," provides:

> (a) The board *shall* adopt, implement, and maintain a parole guidelines system for determining parole action. The guidelines system *shall* be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system *shall* be consistent with the board's primary goal of protecting society and *shall* take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.
>
> (b) The guidelines system required by subsection (a) of this Code section *shall* be adopted by rules or regulations of the board. The rules or regulations shall be adopted in conformity with

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[19] Ga. Const. art. 4 § 2, ¶2(a).

> Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."[20]

In accordance with the mandate of this statute, the Parole Board developed a Parole Decision Guidelines System.[21] These Guidelines begin with a statement of the System's purpose:

> PURPOSE. In the parole decision process, the Board *shall* utilize a set of guidelines which consider both the severity of an individual's offense and the likelihood of the individual successfully completing a term of supervision on parole.[22]

The Guidelines go on to provide a step-by-step procedure that the Board must follow to arrive at a Tentative Parole Month (the month an inmate may expect to be released from prison) for each eligible inmate. First, the Board must assign the inmate a Crime Severity Level:

> The Board deems the nature of the offense to be the most important element in the parole decision. Consequently, the guidelines are to be

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[20] O.C.G.A. § 42-9-40 (1991) (emphasis added).

[21] The Parole Decision Guidelines System is not reprinted in the Georgia Secretary of State's official compilation of the Rules and Regulations of the State of Georgia. Appellant Sultenfuss has attached a copy of the Parole Decision Guidelines System as an appendix to his appellate brief. Appellant's Supplemental Brief Appendix E. The Board has not objected to or otherwise indicated that this appendix is not a true and correct copy of the guidelines system developed by the Board in response to O.C.G.A. § 42-9-40. Accordingly, we will cite to this appendix in our discussion of the Guidelines System.

[22] Appellant's Supplemental Brief Appendix E at ¶ 8-1.01 (emphasis added).

> structured around a Crime Severity Index ranking crimes by increasing decree [sic] of seriousness.[23]

The Crime Severity Level is determined by reference to a table that lists dozens of specific crimes, with each crime assigned a level between I and VII.[24] Second, the Board must assign the inmate a Parole Success Likelihood Score:

> Social and criminal history factors known by the Board rationally to relate to the likelihood of success on parole *shall* be included in an index known as the Parole Success Likelihood Score.[25]

The index from which the Parole Success Likelihood Score is determined consists of eight factors, each with a numerical scoring system designed to reflect the inmate's success or lack thereof as to that factor.[26] Third, the Board must apply the Parole Decision Grid:

> The [Parole Success Likelihood Score] *shall* be used in conjunction with the Crime Severity Level finally to determine a recommended number of months to serve from the Parole Decision Guidelines grid.
>
> . . .

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[23] *Id.*

[24] R1-32 Exh. 3 Attach. B.

[25] Appellant's Supplemental Brief Appendix E at ¶ 8-1.01 (emphasis added).

[26] *Id.* at ¶ 8-17.03 through ¶ 8-25.02.

> PAROLE DECISION GRID. The Parole Decision Grid is the final component of the Parole Decision Guidelines, the application of which determines the months-to-serve recommendation.[27]

Finally, the Board must use the months-to-serve recommendation to fix a Tentative Parole Month:

> TENTATIVE PAROLE MONTH. The Tentative Parole Month, during which the offender may expect to be released, absent new information or other cause to cancel the Board's tentative release decision, *shall* be calculated by adding the recommended months-to-serve to the compute-from date of the controlling sentence.[28]

Thus, in accordance with the statutory mandate of the Georgia legislature, the Board developed the Parole Decision Guidelines System. This System, in turn, mandates that the Board assign an inmate a Crime Severity Level by reference to a table and a Parole Success Likelihood Score by reference to an index; apply the Parole Decision Grid to these scores to arrive at a months-to-serve recommendation; and then fix a Tentative Parole Month by adding the months-to-serve to the beginning date of the inmate's sentence.

Notwithstanding the mandatory language of the statute and the Guidelines quoted above, in other rules promulgated by the Board pursuant to O.C.G.A. § 42-9-40, the Board purports to reserve for itself the discretion to depart from the Parole Decision Grid's months-to-serve

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[27] *Id.* at ¶ 8-17.02 and ¶ 8-26.01 (emphasis added).

[28] *Id.* at ¶ 8-27.01 (emphasis added).

recommendation. Most notably, a rule entitled "Parole Consideration" provides in part:

> In considering parole for persons who will become statutorily eligible for parole consideration and who are serving less than a life sentence, the Board shall review a recommendation as to months to serve. This recommendation will be obtained from the Parole Decision Guidelines system which accounts for the severity of the crime and the inmate's likelihood of success on parole. The inmate's likelihood of success on parole is measured by weighted factors concerning the inmate's criminal and social history which the Board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision. *The Parole Decision Guidelines System is an aid to the Board in making more consistent, soundly based and explainable parole decisions and does not create a liberty interest. The Board specifically reserves the right to exercise its discretion under Georgia Law to disagree with the recommendation resulting from application of the Parole Decision Guidelines and may make an independent decision to deny parole or establish a Tentative Parole Month at any time prior to sentence expiration.* After the Board notifies the inmate of their decision, the inmate may contest either the Crime Severity Level or Parole Success Factor scores by writing within 30 days the Parole Guidelines Director in the Board's Central Office. Prior to an inmate being paroled the inmate's institutional conduct will be reviewed and institutional misconduct may result in a delay in parole release or a decision to deny parole. Any decision rendered under the Parole

> Decision Guidelines may be changed at the discretion of the Board at any time. The Board may modify any part of the Parole Decision Guidelines system at any time.[29]

Thus, according to the Board's own interpretation, the Parole Decision Guidelines System does not create a liberty interest in parole.

C. *Georgia Has Created a Liberty Interest In Parole*

We disagree with the Board's interpretation. Having carefully reviewed the Georgia statutes governing parole, as well as the Parole Decision Guidelines developed and the rules promulgated pursuant to O.C.G.A. § 42-9-40, we conclude that Georgia has created a liberty interest in parole. Several factors require this conclusion.

First, O.C.G.A. § 42-9-40 contains "explicititly mandatory language."[30] Specifically, it provides that the Board "shall" adopt, implement and maintain a parole guidelines system; that the Board "shall" use this system in determining parole actions on all inmates except those

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[29] Ga.Rules 475-3-.05(5) (emphasis added); *see also* R1-32 Exh. 3 Attach. B, document entitled "State Board of Pardons and Paroles Parole Decision Guidelines," which states: "*NOTICE:* THE BOARD SPECIFICALLY RESERVES THE RIGHT TO EXERCISE ITS DISCRETION UNDER GEORGIA LAW TO DENY PAROLE EVEN THOUGH GUIDELINES CRITERIA ARE MET BY AN INMATE. IT IS NOT THE INTENTION OF THE BOARD TO CREATE A 'LIBERTY INTEREST' OF THE TYPE DESCRIBED IN GREENHOLTZ VS. NEBRASKA PENAL INMATES 442 US 1 (1979)."

[30] *Thompson*, 490 U.S. at 463, 109 S.Ct. at 1910 (internal quotations omitted).

serving life sentences; and that the system "shall" take into consideration certain specified factors. The Guidelines also contain mandatory language. They provide that the Board must assign each eligible inmate a Crime Severity level and a Parole Success Likelihood Score; that these scores "shall" be used to determine a recommended number of months to serve from the Parole Decision Grid; and that an inmate's Tentative Parole Month "shall" be calculated by adding the recommended months-to-serve to the beginning date of the inmate's sentence. This mandatory language in the statute and the Guidelines creates a "presumption that parole release will be granted"[31] in accordance with the recommended months-to-serve as determined by the Parole Decision Grid.

Second, the statute and the Guidelines establish "specified substantive predicates"[32] that significantly limit the Board's discretion. The statute specifically mandates the adoption and consistent application of a "parole guidelines system." The Guidelines, which embody the "system" adopted, require that the Board assign each eligible inmate a Crime Severity Level by reference to a table that designates the level to be assigned to specific crimes. The Guidelines further require that the Board determine an inmate's Parole Success Likelihood Score by considering eight specific factors, each with a detailed numerical system for scoring the inmate's relative success as to that factor. Certainly, these eight factors cannot be

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[31] *Allen*, 482 U.S. at 377, 107 S.Ct. at 2420 (internal quotations omitted).

[32] *Thompson*, 490 U.S. at 463, 109 S.Ct. at 1910 (internal quotations omitted).

scored mechanically, and, therefore, the Board exercises some discretion in calculating an inmate's Parole Success Likelihood Score. This is not the type of discretion, however, that is incompatible with the existence of a liberty interest; rather, it is the type of discretion that requires an official to "use judgment in applying the standards set him [or her] by authority."[33] Following the determination of an inmate's Crime Severity Level and Parole Success Likelihood Score, the Guidelines provide for a mechanical application of the Parole Decision Grid and a mechanical calculation of the Tentative Parole Month. Without question, the Guidelines place "substantive limitations on [the Board's] official discretion."[34]

Third, we find it significant that the Georgia legislature chose to change the Georgia parole system in 1980 by enacting O.C.G.A. § 42-9-40. In *Allen*, the Supreme Court relied on a change in the Montana parole statute to support its conclusion that the new statute created a liberty interest in parole. Noting that the old statute granted absolute discretion to the Board, the Court found that the new statute provided an "indication of a legislative intent to cabin the discretion of the Board."[35] Similarly, prior to 1980, the Georgia statutes did not place limits on the Board's discretion to determine when an eligible inmate was to be released on parole. By enacting O.C.G.A. § 42-9-40, the Georgia legislature mandated that such

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[33] *Allen*, 482 U.S. at 375, 107 S.Ct. at 2419 (internal quotations omitted).

[34] *Olim*, 461 U.S. at 249, 103 S.Ct. at 1747 (internal quotations omitted).

[35] 482 U.S. at 381, 107 S.Ct. at 2422.

parole determinations be made in accordance with a parole guidelines system. We see this change in the law as an indication that the Georgia legislature intended to limit the Board's discretion in making parole determinations.

Thus, we conclude that the mandatory language of the statute and the Guidelines, combined with the particularized standards that guide the Board's parole determinations, create a liberty interest in parole release in Georgia. We find unpersuasive the Board's reliance on Ga.Rule 475-3-.05(5), quoted above, in which the Board (1) purports to reserve for itself the discretion to "disagree" with parole determinations resulting from application of the Parole Decision Guidelines System, and (2) states that this System "does not create a liberty interest." This rule is inconsistent with both the applicable statute and the Guidelines. O.C.G.A. § 42-9-40 does not grant the Board the discretion to "disagree" with parole determinations resulting from application of the Guidelines; to the contrary, it mandates that the Guidelines "be used in determining parole actions on all [eligible] inmates. . . . " Likewise, there is no provision in the Guidelines for the Board to depart, or "disagree," with a Guidelines determination. Moreover, we are not bound by the Board's determination that the Parole Decision Guidelines System "does not create a liberty interest."[36] It is for the federal

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[36] This situation, in which the Board purports to declare that the Georgia parole scheme does not create a liberty interest, stands in marked contrast to the situation in Florida, in which the Florida legislature has, by statutory enactment, specifically declared that there is no "right" to parole in Florida: "It is the intent of the Legislature that the decision to parole an inmate

courts to determine whether the Georgia parole scheme, as embodied in the Georgia constitution and the applicable statutes, rules and guidelines, creates a liberty interest in parole release protected by the due process clause of the Fourteenth Amendment.

We also find unpersuasive the Board's reliance on O.C.G.A. § 42-9-42(c) (1991), which provides in part: "No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society." This statute is similar to the Montana statute at issue in *Allen;* that statute provided, in part: " 'A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.' "[37] The Supreme Court concluded that this language was not inconsistent with the liberty interest created by other mandatory language of the statute. Likewise, we conclude that the language of O.C.G.A. § 42-9-42(c) is not inconsistent with the liberty interest created by O.C.G.A. § 42-9-40 and the Guidelines promulgated pursuant thereto.

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from the incarceration portion of his sentence is an act of grace of the state and shall not be considered a right." Fla.Stat. § 947.002 (1985). There is no comparable statute in Georgia.

[37] 482 U.S. at 376-77, 107 S.Ct. at 2420 (quoting Mont.Code Ann. § 46-23-201 (1985)).

III. *CONCLUSION*

Accordingly, we conclude that the current Georgia parole system, as embodied in the Georgia constitution, the Georgia statutes, and the rules and guidelines promulgated pursuant to those statutes, creates a liberty interest in release on parole protected by the due process clause of the Fourteenth Amendment. The district court's decision is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.[38]

PITTMAN, Senior District Judge, concurring in part and dissenting in part:

I concur with that portion of the majority opinion which concludes that this case is not moot. I respectfully

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[38] It has come to the panel's attention that Sultenfuss now has been paroled under supervision. This raises an issue of whether the case is moot. There appears to be a conflict between Supreme Court precedent in *Jago v. Van Curen*, 454 U.S. 14, 21 n. 3, 102 S.Ct. 31, 36 n. 3, 70 L.Ed.2d 13 (1981) (holding case not moot where prisoner had been released on parole subject to conditions "that significantly restrict this freedom"), and a subsequent Eleventh Circuit decision. *Graham v. United States Parole Commission*, 732 F.2d 849 (11th Cir.1984) (holding case moot where prisoner had been released on parole subject to conditions).

In light of this conflict, the panel feels that ultimately the mootness issue must be resolved by the Eleventh Circuit sitting en bank. However, the panel need not decide the mootness issue because here we hold that the liberty-interest issue is "capable of repetition, yet evading review." *See Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969). For this reason, we are filing the opinion.

Members of the panel recommend that the case be considered en bank because of the importance of the liberty-interest issue and the apparent conflict in the law on mootness.

dissent from that portion of the majority opinion which concludes that the Georgia parole system, as embodied in the Georgia constitution, the Georgia statutes, and the rules and guidelines promulgated pursuant to those statutes, creates a liberty interest in release on parole protected by the due process clause of the Fourteenth Amendment. For that reason, I would affirm the judgment of the District Court.

Stephen SULTENFUSS,
Plaintiff-Appellant,

Michael C. Bishop, Plaintiff,

v.

Wayne SNOW, Jr., James T. Morris, Mobley Howell, Michael H. Wing, Bettye O. Hutchings, and Michael J. Bowers,
Defendants-Appellees.

No. 88-8627
Non-Argument Calendar,

United States Court of Appeals,
Eleventh Circuit.

Feb. 20, 1990.

As Amended March 15, 1990.

Prisoners sued prison authorities claiming violation of their due process rights in connection with departures from statutory parole guideline scheme. The United States District Court for the Northern District of Georgia, No. 1:88-cv-1563-GET, G. Ernest Tidwell, J. entered judgment for officials and one prisoner appealed. The Court of Appeals held that: (1) suit seeking pecuniary compensation from prison officials was properly dismissed as frivolous, and (2) prisoners' due process claim based on alleged improper application of parole guidelines was not frivolous.

Affirmed in part, reversed in part and remanded.

Cathy A. Cox, Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE*, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

This lawsuit was brought by several Georgia state inmates alleging, *inter alia*, violation of their constitutional right to due process under the constitution. Bringing suit pursuant to 42 U.S.C.A. § 1983, the inmates contended that the Georgia parole system as created by both statute and regulation provides them with a liberty interest in parole, and that the defendants, the chairman and members of the Georgia Board of Pardons and Paroles and the Attorney General of Georgia, violated their rights by departing from the parole guideline scheme. As relief, the plaintiffs sought both injunctive and declaratory relief and compensatory damages.

The district court *sua sponte* dismissed the plaintiffs' complaint as frivolous under 28 U.S.C.A. § 1915(d). As an initial matter the court found that the request for compensatory relief was wholly frivolous because parole officials are immune from damage suits under 42 U.S.C.A. § 1983. Then, turning to the plaintiffs' claim for equitable relief, the district court concluded that their allegations

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* Judge Robert S. Vance was a member of the panel to which this case was submitted for disposition without oral argument pursuant to 11th Cir.R. 34-3, but due to his death on December 16, 1989, did not participate in this decision. This case was decided by quorum. *See* 28 U.S.C. § 46(d).

failed to state a due process claim upon which relief could be granted.

This appeal was brought by one of the inmate plaintiffs, Stephen Sultenfuss, who argues that the district court erred in dismissing the plaintiffs' due process claims for damages and for equitable relief. For the reasons that follow, we affirm the judgment of the district court as it pertains to the damages claim; however, we reverse the *sua sponte* dismissal of the due process claim.

The Supreme Court has identified two classes of cases in which § 1915(d) authorizes courts to dismiss cases *sua sponte:* (i) "claim[s] based on an indisputably meritless legal theory," and (ii) "those claims whose factual contentions are clearly baseless." *Neitzke v. Williams,* ___ U.S. ___, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338 (1989). Within the former category fall those cases in which either it is readily apparent that the plaintiff's complaint lacks an arguable basis in law or that the defendants are clearly entitled to immunity from suit; within the latter are those cases describing scenarios clearly removed from reality. *Id.*

With the above standards in mind, we now turn to the issues that Sultenfuss raises on appeal. We see no error in the district court's dismissal of the claim for compensatory relief against the individual members of the Board of Pardons and Parole. We have long recognized that parole board members are entitled to quasi-judicial immunity from suits requesting damages based upon the decision to grant or withhold parole. *Fuller v. Georgia State Bd. of Pardons and Parole,* 851 F.2d 1307, 1310

(11th Cir.1988); *Cruz v. Skelton*, 502 F.2d 1101, 1101-02 (5th Cir.1974).

The issue of whether the present Georgia parole system accords inmates a liberty interest, however, presents a markedly different question. In dismissing the complaint, the district court relied upon this court's decision in *Slocum v. Georgia State Bd. of Pardons and Paroles*, 678 F.2d 940, 941-42 (11th Cir.), *cert. denied*, 459 U.S. 1043, 103 S.Ct. 462, 74 L.Ed.2d 612 (1982), which held that the extant Georgia statutes governing parole did not create a protectable expectation of release giving rise to a claim of entitlement for parole.

Were the Georgia system of parole at issue in *Slocum* identical to the Georgia parole system in place today, we would have no problems with the district court's *sua sponte* dismissal of this claim. However, *Slocum* addressed parole decisions made under the Georgia system of parole as it existed in 1979 and 1980; since that time the Georgia legislature enacted a provision requiring the Board of Pardons and Paroles to adopt and apply a parole guidelines system "to be used in determining parole actions on all inmates." O.C.G.A. § 42-9-40 (1980).

Thus, since *Slocum* was decided, the Georgia parole system has been revised significantly. Pursuant to O.C.G.A. § 42-9-40, the Board of Pardons and Paroles has promulgated rules and regulations concerning the new parole guidelines system. While upon close examination, these changes may not have had an actual impact upon the Georgia parole system to vindicate the due process claims at issue, the changes are sufficiently significant to raise an arguable question of law so as to preclude

§ 1915(d) dismissal. *See Neitzke v. Williams*, ___ U.S. at ___, 109 S.Ct. at 1833 ("When a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not").

Our recent decision in *Fuller v. Georgia State Bd. of Pardons and Parole*, 851 F.2d 1307, 1309 (11th Cir.1988) does not dictate a contrary response. In *Fuller*, this court held relying solely upon *Slocum* that a Georgia inmate who challenged a 1985 parole decision did not have an entitlement to or liberty interest in parole under Georgia law. We have reviewed the briefs in *Fuller* and are convinced that it was not brought to the panel's attention that Georgia had adopted a parole guideline system that was substantially different from the parole system at issue in *Slocum*.

"[A] state-created liberty interest may originate in a state statute or in regulations or in the practices of state of county officials." *Whitehorn v. Harrelson*, 758 F.2d 1416, 1422 (11th Cir.1985). Because this court has not yet addressed the effect of the statutory and regulatory changes that Sultenfuss relies upon in making his argument that the Georgia parole system as constituted after implementation of the parole guidelines system creates a liberty interest, we conclude that the district court's *sua sponte* dismissal of the due process claim was in error. In reversing the district court, we intimate no opinion as to whether the new Georgia statute and regulations create a liberty interest; rather, we only conclude that Sultenfuss's due process claim raises an arguable legal issue that should be resolved only after service of the complaint on

the defendants and in response to a motion properly addressing the issue.

Accordingly, we reverse the district court's *sua sponte* dismissal of Sultenfuss's complaint for equitable relief and remand this case for further proceedings consistent with the opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEPHEN SULTENFUSS	)	CASE NO.
	)	1:88-cv-1563-GET
V.	)	
	)	(Filed
WAYNE SNOW, JR.;	)	Nov. 30, 1990)
JAMES T. MORRIS;	)	
MOBLEY HOWELL;	)	
MICHAEL H. WING;	)	
BETTYE O. HUTCHINGS;	)	
MICHAEL J. BOWERS	)	

ORDER

The above-styled matter is before the court on Defendants' Motion for Summary Judgment and on plaintiff's Motion to Compel Answers to Interrogatories, Motion to Compel Production of Documents and Motion for In Camera Inspection.

Factual Background

Plaintiff is currently incarcerated at Central Correctional Institute in Macon, Georgia under the authority of two sentences. One sentence is the result of a violation of the Georgia Controlled Substances Act for which plaintiff received 15 years, to serve 10. The second sentence is for the possession of cocaine for which plaintiff received 15 years calculated from August 24, 1986. Thus, plaintiff's sentence expires August 24, 2001. The possession crime occurred while plaintiff was on parole for prior criminal convictions.

In setting plaintiff's tentative parole release date the Georgia Board of Pardons and Paroles ("Board") first established plaintiff's Success Likelihood score of 11 and a Crime Severity level of II. Given these two factors, the guideline recommendation was a 10-months' term. The Board departed from the 10-month recommendation based on a determination that the Crime Severity level and Success Likelihood score did not adequately reflect the true nature of plaintiff's case. Specifically, the Board's asserted reasons for departure from the guideline recommendation are: (1) severity of plaintiff's offense(s) exceeds that accounted for in the crime severity level; (2) the "parole or probation failure" factor does not fully reflect the seriousness of plaintiff's prior parole failures; (3) the success factors do not fully reflect the seriousness and scope of plaintiff's criminal history; and (4) the success factors do not fully reflect the extent of plaintiff's prior drug involvement. Based on the forgoing, a term of 61 months was set. Plaintiff was notified of this determination. He was also informed of the reasons the Board departed from the 10-month term and informed that he had 30 days in which to appeal the decision if he felt the Board's determination was in error. Plaintiff did not appeal the Board's determination.

Procedural Background

Plaintiff filed a *pro se* Section 1983 action against the chairman and members of the Board and the Attorney General of Georgia (collectively "Defendants") claiming a violation of his right to procedural and substantive due process guaranteed by the Fourteenth Amendment of the United States Constitution. Specifically, plaintiff alleges

that the Georgia parole system creates, by statute and regulation, a constitutionally protected interest in parole and that the Board violated this interest by "deviat[ing] from the parole guidelines in setting Plaintiff's time of incarceration before parole."

Plaintiff's claim was dismissed *sua sponte* by this court based on a 28 U.S.C. § 1915(d) frivolity determination. This decision was affirmed in part, reversed in part and remanded by *Sultenfuss v. Snow*, 894 F.2d 1702 (11th Cir. 1990). The Court of Appeals held: (1) that part of plaintiff's cause of action that sought monetary damages from the defendants was properly dismissed as frivolous, and (2) because the plaintiff's due process claim raises an arguable legal issue, rather that [sic] dismissing as frivolous, this claim should be resolved only in response to a motion properly addressing the issue. *Id.* at 1704.

Pursuant to the decision of the Court of Appeals, this case was reopened March 28, 1990. The Defendants then filed the Motion for Summary Judgment which is presently before the court.

Defendants' Motion for Summary Judgment

I. Plaintiff's Rule 56(f) objection.

As an initial matter, plaintiff asserts that because "[d]efendants are in complete control of information and documents which are material to this case," Rule 56(f), Fed. R. Civ. P., justifies denial of summary judgment. Rule 56(f) provides, in pertinent part, that:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for

> reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment.

Consideration of Defendants' Motion for Summary Judgment presents the sole issue of whether the parole guidelines system of Georgia, as it now exists, creates a protectable due process interest in the plaintiff's consideration for parole. As to this issue, the court can find no material facts that are in dispute. It is not disputed that the guideline recommendation was 10 months. In addition, plaintiff admits that: "I had the right to appeal either my Parole Success Likelihood score or my Crime Severity Level neither of which I disagree." (Sultenfuss Affidavit #8) The fact that the Board departed from the guidelines recommendation is also not disputed.

Because plaintiff had been able to present the facts essential to justify his opposition to Defendants' Motion for Summary Judgment, and these facts are not disputed, there is no need to refuse or delay the application for summary judgment.

II. Plaintiff's Due Process

In reviewing dismissal of plaintiff's constitutional claim, the Court of Appeals noted that, because a liberty interest may be created by state statute or regulation, evaluation of the effect of Georgia's current parole statutes is necessary.

In *Chavous v. Snow, et al.*, Civil Action No. 1:90-cv-859-CAM (N.D. Ga. August 9, 1990) the Honorable Charles A. Moye, Jr. of this district addressed the exact

issue presented in the instant case. Specifically, after careful review of the Georgia constitution, the current applicable parole statutes in Georgia (O.C.G.A. §§ 42-9-40, 42-9-42), and Georgia parole regulations (Ga. Admin. Comp., Chapter 475-3-.05(5)), Judge Moye found that "current Georgia law does not create a liberty interest in parole." (Opinion p. 7).

This court finds the reasoning and holding of *Chavous* to be dispositive of the issue in the present case. Current Georgia law does not create a protectable liberty interest in parole, therefore, determination of plaintiff's parole release date is within the sole discretion of the Parole Board. Further, even if it is assumed that plaintiff was entitled to some procedural due process protection, he has failed to produce evidence sufficient to show that the due process he was afforded did not meet the minimum required by the Constitution.

Accordingly, for the reasons stated above, Defendants' Motion of Summary Judgment is GRANTED.

Plaintiff's Discovery Motions

Pursuant to this Order granting Defendants' Motion for Summary Judgment, Plaintiff's Motion to Compel answers to interrogatories, Motion to Compel production of documents and Motion for In Camera Inspection are DISMISSED AS MOOT.

Summary

1) Defendants' Motion for Summary Judgment is GRANTED.

2) Plaintiff's Motion to Compel Answers to Interrogatories is DISMISSED AS MOOT.

3) Plaintiff's Motion to Compel Production of Documents is DISMISSED AS MOOT.

4) Plaintiff's Motion for In Camera Inspection is DISMISSED AS MOOT.

SO ORDERED, this 30 day of November, 1990.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE,
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEPHEN SULTENFUSS, CHARLES McMULLIN, MICHAEL BISHOP, LELAND DAVIDSON, LARRY KELLEY, DONALD K. DAMRON, Plaintiffs, v. WAYNE SNOW, JR., JAMES T. MORRIS, MOBLEY HOWELL, MICHAEL H. WING, BETTYE HUTCHINGS, MICHAEL J. BOWERS, Defendants.	:	CIVIL ACTION NO. 1:88-cv-1563-GET (Filed Aug. 11, 1988)

ORDER

The plaintiffs, all inmates presently incarcerated at the Central Correctional Institution in Macon, Georgia, have been allowed to proceed *in forma paueris* with this *pro se* civil action brought pursuant to 42 U.S.C. § 1983. The essence of plaintiffs' complaint is that their constitutional rights have been violated by the departure from parole guidelines in determining their tentative parole release dates. Through this action plaintiffs seek equitable relief and damages. This action is presently before the court for a frivolity determination authorized by 28 U.S.C § 1915(d).

In the complaint, the plaintiffs assert that they have a statutorily created liberty interest in parole and thus, an expectation of release or parole consideration. Plaintiffs, all white inmates, claim that "part of the reason" for the Parole Board's departure from the mandatory guidelines scheme in each of their cases is to prevent a "further disparity in the ratio . . . of black to white inmates." Plaintiffs also claim that departing from the guidelines increases prison population, thus allowing the defendants to "expand their bureaucratic empire within the executive branch of the government." Plaintiffs claim that both their due process and equal protection rights have been violated.

With regard to plaintiffs' request for monetary damages, the court notes that parole officials are immune from damage suits under the Civil Rights Act, 42 U.S.C. § 1983. *Johnson v. Wells,* 566 F.2d 1016, 1018 (5th Cir. 1978). Accordingly, plaintiffs' request for damages is hereby DISMISSED as frivolous pursuant to 28 U.S.C. § 1915(d).

To the extent that plaintiffs' allegations can be construed as raising a due process claim with regard to the parole consideration process, the court need not determine whether the plaintiffs have exhausted state remedies as they allege in the complaint, as there is no liberty interest in parole to which due process rights attach. *Slocum v. Georgia State Board of Pardons and Paroles,* 678 F.2d 940 (11th Cir. 1982), *cert. denied,* 459 U.S. 1043 (1982). Because plaintiffs have no constitutional right to parole and because the decision to grant parole is within the discretion of the parole board, plaintiffs cannot challenge the parole consideration process on due process grounds.

Insofar as plaintiffs are attempting to raise an equal protection challenge to the parole consideration process, the court notes that these allegations also fail to state a claim for which relief can be granted. In order to establish a claim for the denial of equal protection, an inmate must show that he is similarly situated with other prisoners who are paroled and that the defendant discriminated against him on the basis of race or some other constitutionally protected interest. *Damiano v. Florida Parole and Probation Commission,* 785 F.2d 929, 932 – 33 (11th Cir. 1986). In the instant case, though the plaintiffs argue that they have been discriminated against due to their race, they have not made a showing that other prisoners similarly situated have been granted parole. Furthermore, vague and conclusory allegations are not sufficient to withstand a motion to dismiss. *Fullman v. Graddick,* 739 F.2d 553, 556 – 57 (11th Cir. 1984).

The allegations made by the plaintiffs are conclusory in nature and fail to indicate that the determination of plaintiffs' tentative parole release dates violated some constitutionally protected interest. Thus, this complaint fails to state a claim upon which relief can be granted and is hereby DISMISSED pursuant to 28 U.S.C. § 1915(d).

IT IS SO ORDERED, this 11 day of Aug, 1988.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
UNITED STATES
DISTRICT JUDGE

APPENDIX E

CHAPTER 8-00

PAROLE DECISION GUIDELINES SYSTEM

8-1.01 PURPOSE. In the parole decision process, the Board [shall] *utilize* a set of guidelines which consider both the severity of an individual's offense and the likelihood of the individual successfully completing a term of supervision on parole. The Board deems the *nature of the offense* to be the most important element in the parole decision. Consequently, the guidelines are to be structured around a Crime Severity Index ranking crimes by increasing degree of seriousness. Social and criminal history factors known by the Board rationally to relate to the likelihood of success on parole *shall* be included in an index known as the Parole Success Likelihood Score.

8-1.02 The Parole Decision Guidelines System shall be utilized to promote the following policy *goals of this Board*:

(a) Objective and equitable use of the clemency power in determining appropriate lengths of imprisonment for individual inmates;

(b) Equitable and consistent terms of imprisonment for all inmates sharing similar personal behavior histories and convictions for similar crimes, determined without reference to impertinent factors such as race and social rank of the offender or the victim;

(c) Admitting a formalized clemency decision process emphasizing justice and equality to public scrutiny;

(d) Use of empirical evidence to determine, evaluate, and reevaluate factors found to affect parole success or failure, and to make beneficial use of such factors.

8-2.01 BENEFIT TO DEPARTMENT OF CORRECTIONS. The Board intends its use of the Parole Decision Guidelines System to benefit the Department of Corrections as follows:

(a) By being advised of projected release dates shortly after sentences are imposed, the Department of Corrections may accurately project inmate populations and design treatment and rehabilitation programs to meet the needs of the population.

(b) By eliminating the uncertainty of release dates, inmate morale and sincere participation in rehabilitation programs is enhanced.

8-3.01 CASE FILES. The Case Processing Unit delivers to the Guidelines Unit each case file which is complete and ready for rating, as defined in Board policy for the Case Processing Unit. The Guidelines Unit shall be responsible for maintenance of case files throughout the rating and balloting process.

8-3.02 The Deputy Director of Clemency shall assign case files to Hearing Examiners for rating. When the Members have made their determination and returned a case file to the possession of the Guidelines Unit, the case file shall be routed through Computer Services to the Dispositions Unit.

8-4.01 REVIEW OF INSTITUTIONAL CONDUCT. At six months prior to an inmate's TPM, the Processing Unit

shall request and obtain an institutional Parole Review Summary from the Department of Corrections.

8-4.02 On receipt of the completed Parole Review Summary, the Case Processing Unit shall route the case file to the Hearing Examiner who rated the case. Consistent with criteria established by the Board, the Hearing Examiner *shall implement* the release decision or route the case file back to the Board for its reconsideration.

8-4.03 In the event the Hearing Examiner who rated the case is no longer in service to the Board as a Hearing Examiner, the Case Processing Unit shall route the case file to a Hearing Examiner designated by the Deputy Director of Clemency.

8-5.01 ELIGIBILITY FOR CONSIDERATION. Inmates considered under the Parole Decision Guidelines must have a straight time sentence in excess of one year or an earned time sentence of at least two years.

8-6.01 LIFE SENTENCE INMATES NOT ELIGIBLE. Inmates with life sentences shall not be considered through the Parole Decision Guidelines System.

8-7.01 USE OF RATING SUMMARY. The Hearing Examiner *shall* rate each individual offender's case on a Rating Summary sheet substantially in form with Annexure 1 affixed to this policy. Completion of the Rating Summary finishes staff processing of a case through the Parole Decision Guidelines System.

8-7.02 It is a policy goal of the Board that initial evaluation and rating of inmates will be completed within four months of their entry into State custody.

8-8.01 RE-RATING CASE FILES. An offender's case file shall be re-rated by the Hearing Examiner who provided the original rating in the event of any of the following:

(a) Sentence Recalculation. The GDC may notify the Board it has recalculated an inmate's sentence(s) due to court ordered deletion of a sentence, or a change in the compute-from date of the sentence(s). The Deputy Director of Clenency [sic] shall be authorized to recalculate a TPM in all cases involving a modification of the compute-from date of the sentence.

(b) Additional Sentence. Should an inmate receive an additional felony sentence which extends his discharge date or which moves him into a higher Crime Severity Level, a new Rating Summary shall be prepared and the case file returned to the Board for a new decision.

(c) New Information. Board decisions to grant parole are tentative until actually implemented. The arrival of material new information from any source which bears significantly on the original Board decision may necessitate re-rating. Board policy for new information shall be observed by Hearing Examiners in determining whether the new information does or does not necessitate re-rating of the case.

8-9.01 DIFFERING DEGREES OF SEVERITY WITHIN ONE OFFENSE. The Board shall differentiate between certain offenses depending upon whether a weapon was used, the dollar amount of theft and the number of counts.

8-9.02 Theft offenses are classified based on the amount of damage caused to the victim's property during the theft as well as the value of the property stolen.

8-9.03 Drug offenses are classified based on the gross weight of any mixture containing a controlled substance.

8-10.01 ALL OFFENSES MUST BE RATED. Hearing Examiners shall thoroughly review the file and determine which Crime Severity Level is appropriate for *each* crime resulting in a confinement sentence or providing the basis for revocation. Each individual offense shall be rated and entered on the Rating Summary.

8-11.01 HIGHEST SEVERITY LEVEL DETERMINES CLASSIFICATION. After all offenses have been rated, the highest Crime Severity Level determined shall constitute the Highest Crime Severity Level entered on the Rating Summary.

8-12.01 PLEA BARGAINS. Crime Severity Level determinations shall be based on actual convictions of record, without reference to original arrest or booking charges, or *allegations in accusations* or indictments for which an actual conviction was not obtained.

8-13.01 REVOCATION OF PROBATION OR PAROLE. Hearing Examiners rating cases involving revoked parole or probation shall observe the following:

(a) Revocation orders. The Order of Revocation of parole or probation shall be the only document utilized to determine the Crime Severity Level.

(b) Probation revocation involving new offense but no new additional sentence. In cases

where probation is revoked for a new offense and the offender does not receive an additional sentence, the Crime Severity Level shall be determined by the new offense as described on the revocation order.

(c) Probation revocation involving technicals only. In cases where probation is revoked only for technical violations, the following shall apply:

1. If the current revocation constitutes the first revocation on the same sentence, the offender shall be placed in Crime Severity Level 1.

2. If the current revocation constitutes a second revocation on the same sentence, the offender shall be placed in Crime Severity Level 2.

3. If the current revocation constitutes a third probation revocation on the same sentence, the offender shall be placed in Crime Severity Level 3.

(d) Probation revocation with additional sentence. The Crime Severity Level for persons serving for probation revocation plus an additional sentence shall be determined by the reasons for revocation stated on the Order of Revocation, and the additional offense(s) for which the person has been convicted. In such cases, the following shall apply:

1. If the charge which resulted in the probated sentence being revoked was reduced in severity during plea bargaining, only the reduced charge shall

be used to determine the Crime Severity Level.

2. If separate prosecution was not pursued on a new offense stated on a revocation order as a basis for revocation, the original findings of the revoking court shall be used.

(e) Revocation of Parole. Hearing Examiners shall apply the following rules when determining the Crime Severity Level of revoked parolees:

1. The basis for revocation as stated on the Revocation Order shall determine the Crime Severity Level, rather than the offense for which the offender had been serving on parole.

2. Revocation for technical violations including convictions for violating city ordinances shall result in the offender being placed in Crime Severity Level 1.

3. Revocations based on the commission of, or conviction for, any new misdemeanor or felony crime shall result in the application of the Crime Severity Level to which the new offense belongs.

8-14.01 ATTEMPTED OFFENSES. Persons convicted of attempting to commit an offense shall be classified one Crime Severity Level lower than a person convicted of actually committing the offense.

8-14.02 An aggravated assault occurring with an intent to commit rape shall be a Crime Severity Level 6 offense.

8-15.01 THEFT OFFENSES. Hearing Examiners shall determine the Crime Severity Level in theft offenses by determining the value of the property stolen from the victim(s) plus the value of any damage caused to the property of the victim(s) during the theft or asportation of the property.

8-16.01 DRUG OFFENSES. In cases involving cocaine, marijuana, heroin, Methaqualone, Schedule I or Schedule II opiate drugs, or any derivatives of any of the foregoing, the Hearing Examiner shall determine the Crime Severity Level according to the gross weight of any mixture containing any of these controlled substances.

8-17.01 PAROLE SUCCESS FACTORS. The second component of the Parole Decision Guidelines System combines eight social and criminal history factors found to relate to the likelihood of one's success on parole, which are labeled "Parole Success Factors."

8-17.02 Inmates *shall* be rated by Hearing Examiners on a scale from 0-20 with 20 being the highest possible score. The score shall be used in conjunction with the Crime Severity Level finally to determine a recommended number of months to serve from the Parole Decision Guidelines grid.

8-17.03 The eight factors are as follows:

(a) Age at First Commitment;

(b) Prior Juvenile and Adult Convictions;

(c) Prior Incarcerations Since Age 17;

(d) Probation/Parole Failure;

(e) Use, Possession, or Attempt to Obtain Heroin or Opiate Drugs;

(f) Commitment Offense Involved Burglary or Forgery;

(g) Fully Employed During the Six Months Prior to Current Offense.

8-18.01 AGE AT FIRST COMMITMENT: Age at First Commitment: (26 or over = 5) (22-25 = 3) (18-21 = 2) (17 or less = 0).

8-18.02 This factor includes both juvenile and adult commitments or incarcerations.

8-18.03 To be counted, a juvenile commitment must have been for an offense which would have been considered an offense if the juvenile were an adult. Juvenile status offenses, such as runaway or truancy, shall not be counted.

8-18.04 Age at First Commitment shall be determined as follows:

(a) Regardless of the age at the time of incarceration, the age of the person on the day of conviction or revocation shall be used;

(b) Pretrial detention on a prosecution culminating in dismissal or acquittal shall not be counted;

(c) Commitments must be for an uninterrupted period of 60 days or longer;

(d) For incarcerations involving probation revocation plus a new conviction, Age at First Commitment shall be computed from the date of the earliest incarceration occurring in consequence of the behavior providing the basis for the revocation or new conviction.

8-19.01 PRIOR JUVENILE AND ADULT CONVICTIONS: (none = 3) (1 = 2) (2 or 3 = 1) (4 or more = 0).

8-19.02 All individual convictions are counted in this factor, other than misdemeanor traffic violations not resulting in an uninterrupted term of incarceration exceeding 60 days.

8-19.03 Multiple Counts. Each individual count is considered to be a conviction, regardless of how may [sic] counts might have been charged in one accusation or indictment, or disposed of in one court proceeding.

8-19.04 Juvenile Charges. Juvenile dispositions shall be counted if the disposition resulted in probation, placement in a Youth Detention Center, training school, or a State agency. Informal adjustments of juvenile charges shall not be counted.

8-19.05 Military Charges. All military offenses shall be counted if the offense would be considered an offense 9f [sic] committed by a civilian.

8-19.06 Excluded Charges. Certain charges shall not be counted, as follows:

(a) If a person is returned to prison on a probation revocation plus a new conviction, the original conviction resulting in a probated sentence shall not be counted as a prior conviction.

(b) Any current offense is not counted as a prior conviction.

(c) Offenses processed under the terms of the Georgia First Offender Act are not counted as prior convictions if the filed information

shows the offender successfully completed his term of supervision, thereby avoiding any entry of conviction in the case.

8-20.01 PRIOR INCARCERATIONS SINCE AGE 17: (None = 2) (1 = 1) (2 or more = 0).

8-20.02 Any and all incarcerations since age 17 including probation and parole revocations, shall be counted, provided the incarceration involved an uninterrupted period of 60 days or more.

8-20.03 An incarceration for an offense prior to age 17 shall be counted provided the incarceration extended 60 days or longer after the offender's 17th birthday.

8-20.04 A period of incarceration which involves different jurisdictions and detainers shall be counted as one confinement, provided there has been no break in confinement.

8-21.01 PROBATION/PAROLE FAILURE: (none = 4) (probation only = 2) (parole only = 1) (both probation and parole = 0).

8-21.02 The Hearing Examiner shall determine a probation and/or a parole failure has occurred if the case file establishes any of the following:

(a) The offender was convicted of an offense, as defined under Factor (b), which was perpetrated during the term of parole or probation supervision. Revocation need not have occurred. If the offender was serving concurrent terms of parole and probation when the new offense was perpetrated, the Probation/Parole Failure score would be 0.

(b) Formal revocation of either probation or parole, or of both probation and parole, in consequence of a technical violation committed during the term of supervision.

8-22.01 USE, POSSESSION, OR ATTEMPT TO OBTAIN HEROIN OR OPIATE DRUGS: (No = 1) (Yes = 0)

8-22.02 This factor applies to those offenders whose files document the illegal use, possession, or attempt to obtain heroin or opiate drugs. Heroin and opiates shall be defined as the actual drugs or any synthetic or derivative of heroin or opium.

8-23.01 COMMITMENT OFFENSE INVOLVED BURGLARY OR FORGERY: (No = 2) (Yes = 0)

8-23.02 This factor applies to offenders serving on a conviction for the crime of either burglary or forgery.

8-24.01 FULLY EMPLOYED DURING THE SIX MONTHS PRIOR TO CURRENT OFFENSE: (yes = 1) (no = 0)

8-24.02 This factor applies to those persons who were employed with one employer, with no break in employment for a six month period prior to the date of the first arrest which led to the present incarceration.

8-24.03 Employment credit shall be given to a full time student, or an individual who worked part time while attending school part time.

8-24.04 Offenders who are disabled, retired, or housewives shall not be deemed to have been employed for the purpose of this factor.

8-25.01 HAD WRAT (Wide Range Achievement Testing) SCORE OF 8 OR HIGHER IN INITIAL DIAGNOSTIC TESTING: (yes = 2) (no = 0)

8-25.02 This factor shall be determined from the file copy of the GDC Diagnostic Summary.

8-26.01 PAROLE DECISION GRID. The Parole Decision Grid is the final component of the Parole Decision Guidelines, the application of which determines the months-to-serve recommendation. The approved Parole Decision Grid is affixed to this Policy as Annexure 2.

8-27.01 TENTATIVE PAROLE MONTH. The Tentative Parole Month, during which the offender may expect to be released, absent new information or other cause to cancel the Board's tentative release decision, shall be calculated by adding the recommended months-to-serve to the compute-from date of the controlling sentence.

8-28.01 SERVICE OF ONE-THIRD OF SENTENCE AS MINIMUM REQUIREMENT IN CERTAIN CASES. Inmates whose offense(s) fall in Crime Severity Level VI and VII shall be required in all cases to serve not less than one-third of their confinement sentence or the grid recommendation, whichsoever is greater.

8-28.02 In no instance shall a months-to-serve recommendation be less than any constitutional minimum term of service applicable to the offender.

8-29.01 REQUESTS FOR RECONSIDERATION. An inmate who believes an error exists in the information utilized to determine the months-to-serve recommendation received by the Board through the Parole Decision

Guidelines System, or who asserts a numerical miscalculation has occurred, may submit on a form provided by the Board a written request for reconsideration addressed to the Deputy Director of Clemency.

8-29.02 The approved Request for Reconsideration form is affixed to this Policy as Annexure 3. The request for reconsideration must be submitted within 30 days from the inmate's receipt of the Notice of Action document. For proper cause shown, the Deputy Director of Clemency may entertain an out-of-time request for reconsideration.

8-29.03 Should the Deputy Director of Clemency determine the request for reconsideration to be meritorious, the case file shall be returned to the appropriate Hearing Examiner for correction.

8-29.04 Should the necessary correction modify a months-to-serve recommendation previously accepted by the Board, the case file shall be sent before the Board for a new decision. The inmate shall receive notice of the Board's new decision. Should the necessary correction not result in a changed months-to-serve recommendation, the inmate shall be so notified.

8-30.01 FINAL REVIEW OF INSTITUTIONAL BEHAVIOR. At six months prior to an inmate's TPM or discharge date, the Board requests from the GDC a Parole Review Summary in order to survey the institutional performance of the inmate, and to make any final adjustment to the TPM or discharge date made appropriate by the inmate's institutional behavior.

8-31.01 ABOVE AVERAGE RATING. The Board *may* consider rewarding an inmate for serving his time in prison in a manner found by GDC institutional and Departmental staff to be demonstrably above average.

8-31.02 An inmate's Tentative Parole Month, or discharge date, may be advanced, or accumulated TPM Extensions may be reduced, upon appropriate recommendation by the DOC as follows:

(a) An advance of up to 60 days may be granted for inmates with a controlling sentence of five years or less;

(b) An advance of up to 90 days may be granted for inmates with a controlling sentence exceeding five years;

8-31.03 The Board shall not consider advancing the TPM of the following:

(a) Inmates serving for armed robbery who would serve less than the 5 year constitutional minimum time requirement should the TPM be advanced;

(b) Inmates in Crime Severity Level VI or VII who would serve less than one third of their sentence should the TPM be advanced.

8-32.01 BELOW AVERAGE RATING. The Board shall consider DOC recommendations to extend an inmate's TPM due to misconduct while confined. Any such recommendation shall be documented, except under exigent circumstances, in a manner satisfying such minimum Due Process requirements as have been established for inmates of the GDC.

8-33.01 AUTHORITY OF HEARING EXAMINERS TO ACT ON GDC RECOMMENDATIONS. In case where the Board has set a TPM which, under Board Policy, may be considered for advancement, the Hearing Examiner may advance the TPM by the recommended period.

8-33.02 In cases where the Board has declined to grant any parole and the offender has a history of violence, or is serving for a violent offense, a GDC recommendation to advance the discharge date must be referred to the Board for its decision.

8-33.03 In cases where the inmate has a history of parole failure, or the Hearing Examiner discerns other substantial reasons for declining to accept the GDC recommendation, the case and an accompanying memorandum shall be sent by the Hearing Examiner to the Board for its action on the GDC recommendation.

8-34.01 NOTICE TO GDC. In all cases where a GDC recommendation to advance a TPM or discharge date has been declined by the Board, the Deputy Director of Clemency shall so notify the GDC Office of Inmate Administration.

8-35.01 RECEIPT OF POST-FINAL REVIEW DISCIPLINARY REPORTS. In the event that the Board receives an additional Disciplinary Report on an inmate for whom the final review has been performed, but prior to the effective release date of the inmate, the Disposition Unit shall route the case file to the Hearing Examiner who performed the final review. Acting expeditiously, the Hearing Examiner shall, as the facts warrant:

(a) Advise the Disposition Unit to cancel the release, and resubmit the case file to the Board for its reconsideration; or,

(b) Issue instructions to the Disposition Unit to proceed with the scheduled release, if the Hearing Examiner deems the Disciplinary Report to be insufficiently serious to warrant cancellation of the scheduled release.

8-36.01 CRIMES COMMITTED DURING INCARCERATION OR ESCAPE. The Board shall maximally penalize any inmate convicted of perpetrating a new criminal offense while confined, or during a period of escape.

8-36.02 The TPM or discharge date resulting from the last Board decision in the case, plus any non-running time accumulated, shall be used as the compute from date for the new sentence. A new months-to-serve recommendation shall be provided to the Board.

8-36.03 Crime Severity Levels shall be based on the new offense only. Parole Success Factors shall be reviewed and recalculated as necessary.

8-37.01 COMMENTS AND RECOMMENDATION OF HEARING EXAMINER. Under this section of the Rating Summary the Hearing Examiner shall provide the Board with the following information:

(a) A summary of any outstanding aspects of the case which may have an impact on the parole decision;

(b) Any mitigating or aggravating circumstances contained in the offense;

(c) A recommendation as to specific parole action – whether to agree or disagree with the Guidelines;

(d) In cases involving parole revocation, the recommendation of the supervising Parole Officer shall be included.

8-38.01 ADDITIONAL SENTENCES. If an inmate receives an additional sentence for a crime which occurred prior to entering custody, the case shall be routed to the Deputy Director of Clemency, who shall determine whether the new sentence necessitates re-rating of the case file to obtain a new months-to-serve recommendation for submission to the Board.

8-38.02 The Guidelines shall not be reapplied if the new sentence does not extend a previous discharge date, and the original Board decision was to deny parole.

8-38.03 The Guidelines shall not be reapplied if the offense was known to the Board at the time of their original decision. When the Guidelines are reapplied, the new months-to-serve recommendation shall be computed from the original compute from date.

8-39.01 PERIODIC MODIFICATION OF PROGRAM ELEMENTS. The Board intends, as a policy goal, not to depart from the months-to-serve recommendations received through the Parole Decision Guidelines System in more than 20% of cases acted on by the Board.

8-39.02 Annually, the several elements of the Guidelines System shall be reviewed and adjusted as may be appropriate in furtherance of this policy goal. The Deputy Director of Clemency, with the assistance of the Director of Computer Services, shall identify and report to the

Board on categories of offenses or parole success factors which are found to relate to any pattern of departure from months-to-serve recommendations in excess of 20% of all cases acted on by the Board during the previous year.

8-40.01 ROUTING OF CODEFENDANT FILES DURING DECISION PROCESS. All codefendant case files shall be routed together, regardless of sentence length, when a release decision is being made on one or more of the codefendants. Cases already having a decision, or not ready for consideration, shall be routed together for information and comparison purposes.

8-40.02 The routing together of codefendant case files shall include all initial considerations and all reconsiderations, except parole revocations without a new sentence and Final Reviews.

8-40.03 If a case file is to be routed due to imposition of an additional sentence, only codefendants in the additional sentence case need be submitted together.

8-40.04 A parole revocation *with* a new sentence shall be routed with the case files of any codefendants in the new sentence case.

8-40.05 Codefendant case files shall be pulled from any location other than Archives. Codefendant files are to be pulled for routing together even if they are convicted of different offenses, e.g. armed robbery, robbery.

8-40.06 In multiple offense cases, if there is a clearly more serious offense and the controlling sentence pertains to only some of the codefendants, only those codefendants participating in the more serious offense case

need be routed together, e.g. 5 persons are convicted of a burglary in which they all are codefendants, but one individual codefendant also has an armed robbery sentence. The codefendants in the burglary need not be routed with the one convicted of armed robbery.

8-40.07 Where a group of codefendants are convicted of numerous offenses, but some are codefendants in only two of the cases, only those who are codefendants in the majority of cases must be routed together.

8-40.08 For multiple offense cases falling between the two preceding policy statements, the Case Processing Unit shall have discretion to decide whether the case files should be routed together. Such decisions shall be guided by whether relative culpability between codefendants may be judged on their joint participation in the offenses.

8-40.09 The Case Processing Unit may exercise discretion in deciding whether to delay a case a short time while completing other cases, or to submit a completed case along with incomplete cases.

ANNEXURE 2

STATE BOARD OF PARDONS AND PAROLES PAROLE DECISION GUIDELINES

NOTICE: THE BOARD SPECIFICALLY RESERVES THE RIGHT TO EXERCISE ITS DISCRETION UNDER GEORGIA LAW TO DENY PAROLE EVEN THOUGH GUIDELINES CRITERIA, ARE MET BY AN INMATE. IT IS NOT THE INTENTION OF THE BOARD TO CREATE A "LIBERTY INTEREST" OF THE TYPE DESCRIBED IN GREENHOLTZ VS. NEBRASKA PENAL INMATES 442 US 1 (1979).

Parole Decision Guidelines help the Board make a more consistent, soundly based, prompt, and explainable parole decision. Guidelines help the Board decide on a Tentative Parole Month for the inmate or decide that the inmate will complete his sentence without parole. When making decisions, the Board may depart from the Guidelines recommendation and make an independent decision using the full discretion given it under Georgia Law. The length of the prison sentence imposed by the court will be considered in establishing a Tentative Parole Month.

GUIDELINES RECOMMENDED MONTHS TO SERVE: Read across from the Crime Severity Level and down from the Parole Success Likelihood Score to find the Guidelines recommended months to serve. For Crime Severity Levels VI and VII, the Guidelines recommendation will be one-third of the court imposed sentence length or the grid recommendation, *whichever is greater.* The Board, using its discretion in specific cases, may depart from the Guidelines recommendation.

PAROLE SUCCESS LIKELIHOOD SCORE

CRIME SEVERITY LEVEL	EXCELLENT 13-20	GOOD 11-12	AVERAGE 9-10	FAIR 6-8	POOR 0-5
I	4	6	8	12	18
II	6	8	9	14	21
III	8	9	12	15	24
IV	10	12	15	18	27
V	20	25	30	40	52
VI	36	48	54	60	78
VII	60	72	78	90	102

If the Board has agreed with the Guidelines Recommendation and the inmate believes the Crime Severity Level or any Parole Success Factor has been scored incorrectly, he/she may ask the Board, within 30 days, to recompute the scores. The Board will consider any verifiable information submitted to substantiate the request. Such requests may be submitted in any written form and should be directed to the Parole Guidelines Director, State Board of Pardons and Paroles, Floyd Veterans Building, Fifth Floor East, 2 Martin Luther King, Jr., Drive, S.E. Atlanta, GA 30334.

If the Board's tentative decision is to depart from the Guidelines recommendation, and the number of months to serve is more than three years beyond the Guidelines recommendation, the case will be reviewed at the Guidelines recommendation and each three years thereafter.

Institutional conduct has not been evaluated at this time. The Board expects the inmate to use his/her time in confinement in a constructive manner. Exemplary conduct may result in a parole release prior to the scheduled

release month. Institutional misconduct will result in a delay in a parole release or a decision to parole.

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HEADLINE: Governor's Anti-crime measures 'Thrown back in Prison' Get-tough rules to be on November ballot, but parole board opts to enforce some now

BYLINE: By Rhonda Cook STAFF WRITER

BODY:

Lillian Dean killed her husband in June 1984. He was threatening to shoot her, and they were struggling over a gun when she shot him.

Her sentence was scheduled to end in April after six years in prison and four years in a halfway house. The 54-year-old grandmother's prison behavior was exceptional, and for the past two years she has paid part of her living expenses from her earnings as a motel housekeeper.

But weeks before she expected to be set free, the state Board of Pardons and Paroles told Dean she would have to give up her job. It was returning her to prison until 2004, about the time she qualifies for Social Security. The added prison time for Dean will cost Georgia taxpayers about $ 400,000.

The extended jail time for Dean and scores of other inmates is one of the first consequences of Gov. Zell Miller's anti-crime package, approved by the Legislature

this year. Under the new rules, violent offenders cannot be paroled, and those convicted of a second violent felony would be imprisoned forever under Miller's "two strikes you're out" initiative.

The package isn't yet law. It will be voted on during November elections. But the parole board, the state's sole authority in deciding clemency, decided to begin implementing some of its tougher sentencing measures long before the vote takes place.

Already, about 50 men and women have been moved out of halfway houses and back to prison, and scores more soon will be told they will remain in prison longer than they expected. Those inmates include non-violent forgers and shoplifters, as well as abused women who killed men who beat them.

Besides delaying inmates' release, the board also is telling them that taking prison-sponsored educational and vocational classes won't improve their chances of parole, despite a 1992 law that tied the classroom credits to clemency.

"Things have sort of changed over here," said Wayne Garner, one of the board's five members. "This is a very bold thing, and it's going to cause a lot of heartache."

The board's action reflects the public's growing fear, and intolerance, of crime. And the state now has a lot more space to lock up criminals. Since last year, some 7,335 new prison beds have been opened as the state wraps up a major prison construction program.

According to state officials, the tougher sentencing guidelines on the November ballot will require at least an

extra $ 100 million a year once the [sic] they are fully implemented. That's enough to cover the combined current annual operating budgets of the state departments of Natural Resources, Labor and Insurance.

Although figures weren't available on how many inmates the new law would add to the prison population, the overall number of inmates in Georgia prisons is projected to jump to 53,000 from the current 30,000 over the next 10 years.

But lawyers, advocates for prisoners and some legislators warn that the get-tough approach could do more harm than good.

"Any type of assembly-line justice is inappropriate in a democracy, whether it is the wholesale freeing of prisoners or the wholesale extension of their parole dates," said Richard D. Allen Jr., an attorney for one of the inmates whose parole was revoked.

Rep. Denmark Groover (D-Macon), who urged his legislative colleagues to use caution regarding the anti-crime legislation, shared Allen's concerns. "I hope that the public demand for law and order and protection from criminals does not stampede public officials, charged with exercising discretion in individual cases, from performing their duties," he said.

Others argue that the board's decisions to renege on paroles sends the wrong message to inmates who follow the rules and are well-behaved.

"People in power are playing to that demand that they be harsh on prisoners . . . ," said the Rev. Anne Callison of the Coalition for Justice for Women in Prison,

"and that's just taking away all sorts of reason or compassion, or even using the kind of punishment that we know works."

Dean is serving time for her second conviction for manslaughter. The first was in 1974 for killing a woman during a fight over a man. But she says prison-sponsored classes have taught her to deal with abuse and to control her anger.

Until Dean was moved from a halfway house a few weeks ago, she worked at a nearby motel. Before that, she worked at the Governor's Mansion, where she came to know Miller and his wife, Shirley. "I love the Miller family," Dean said.

Ironically, it's the governor's legislation that apparently has earned her another decade behind bars – at a cost to taxpayers of about $ 40,000 a year, the state's average annual price tag for housing inmates.

"Is this what the governor and the people want Georgia's criminal justice system to mean?" said Teresa Nelson of the American Civil Liberties Union. "We are going to keep those people in expensive incarceration? This makes a joke of rehabilitation."

Miller spokesman Rick Dent said, "If we have prison space, then prisoners should serve their time."

There are others like Dean who will spend more time in prison:

Clarissa Smith was sentenced to five years for killing her abusive common-law husband who was attacking her at the time. She was working at an automobile paint and repair shop and paying some of her living expenses when

the parole board ordered her moved from a halfway house back to prison for another year. She had expected to be released this month.

Marcus Swindell, convicted of a slaying during an alcohol-induced argument, has enrolled in alcohol-abuse programs and worked as a carpenter near the halfway house where he has lived almost a year. He was sent back to prison until 2002 to complete his 12-year sentence.

Martha Stowe, a 50-year-old grandmother, admitted killing her abusive husband in 1989. For 2 1/2 years, she lived in halfway houses in Atlanta and Macon while working at nearby restaurants. She expected to be freed this month, but the parole board has returned her to prison until 1999.

"Some of those that come up like that are unfortunate," Garner said. "But you're going to have a lot less shoplifters and forgers [staying in prison longer] and more violent offenders. We're not extending [prison time for] shoplifters and forgers."

But Sandy Daniels, a mother of four, was removed from a halfway house and returned to prison for at least another year. Daniels, who had a prior shoplifting conviction, was sentenced to five years in 1992 for three counts of shoplifting for stealing bath soap and clothing, each charge involving merchandise valued at less than $ 100.

"It's cruel and inexcusable that someone who has proven that they can manage their lives and be productive citizens are thrown back in prison," Callison said. "What does that say about following society's rules?"

GRAPHIC: Color Photo: Lillian Dean in prison. / Marlene Karas / Staff Color Photo: Mug shot of Clarissa Smith. / Marlene Karas / Staff Color Photo: Mug shot of Martha Stowe. / Marlene Karas / Staff Photo: Mug shot of Zell Miller Box: The board Members of the State Board of Pardons and Paroles: James T. Morris, chairman, Athens J. Wayne Garner, Carrollton Bettye O. Hutchings, Macon Timothy E. Jones, Atlanta Bobby K. Whitworth, Gwinnett County

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No. 94-1178

In The

Supreme Court of the United States

October Term, 1994

STEPHEN G. SULTENFUSS,

Petitioner,

v.

WAYNE SNOW, JR.,
(FORMER) CHAIRMAN OF THE GEORGIA STATE BOARD OF PARDONS AND PAROLES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Georgia parole system creates an expectation of release protected by the due process clause of the Fourteenth Amendment?

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No. 94-1178

In The

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STEPHEN G. SULTENFUSS,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Come now Respondents in the above-captioned matter and present this their Response to the Petition for Writ of Certiorari and show reasons why the writ should be denied.

SUMMARY OF ARGUMENT

The court below correctly applied the test for determining whether a state has created a liberty interest and correctly held that the Georgia parole guidelines system does not create an expectation of release on parole. Petitioner focuses on irrelevant mandatory language and irrelevant substantive predicates in an attempt to find some promise of release.

Moreover, the Eleventh Circuit's decision is consistent with legislative intent as discerned by the rules of statutory interpretation. The decision below is also consistent with Georgia Supreme Court precedent and the administrative agency's interpretation of its obligations under the guidelines statute. Finally, the decision below is consistent with this Court's equitable considerations which encourage parole agencies to experiment in an effort to create fairer parole systems. There is no reason for further review by this Court.

STATEMENT OF THE CASE

As requested in Supreme Court Rule 15, Respondents here focus on Petitioner's mistatement of facts in the Petition. Petitioner makes three fundamental misstatements: 1) he suggests that the enactment of the guidelines statute "replaced" former parole statutes; 2) he confuses a grid recommended parole month with a Board recommended parole month; and 3) he raises issues of alleged false information in his parole which were not preserved below.

First, the guidelines statute did not "replace [Georgia's] parole statute" as suggested by Petitioner in his question presented. The new provision was not a replacement of any existing parole statute but amounted to a new section of the Parole Act. Ga. Laws 1980, p. 404. (Appendix one.)

Second, Petitioner confuses two phrases used by the Board under the guidelines system; "guidelines grid recommendation" and "tentative parole month." The grid recommended number of months to serve is the result of two factors: the crime severity level rating and the parole success likelihood score. The crime severity rating is a predetermined score which is based, except in exceptional circumstances, on the controlling crime of conviction. Petitioner's crime severity level was designated at level II on a scale of I to VII with I being the least severe.

The parole success likelihood score is a total score from eight weighted factors previously determined by the Board to provide some indication of recidivism. Out of a possible 20 points, Petitioner received a success score of 11. The success score and severity level are then applied to an established grid which produces a grid recommended months to serve. The grid recommended Petitioner serve ten months of his fifteen-year sentence. Petitioner's allegation is that he had an expectation to be released at ten months as recommended under the grid.

When it is convenient for his argument, Petitioner confuses the grid recommended months to serve with the tentative parole month. Petitioner ignores the next step in the parole consideration process which is the routing of the parole file to Board members for their votes. The

guidelines system calls for the grid recommendation to be routed with the file to Board members for Board recommendations. The Board members when voting may adopt the grid recommendation but do not necessarily have to. The Board's recommended months to serve (which may or may not be the same as the grid recommendation) is then added to the inmate's sentence computation date resulting in a tentative parole month.

Petitioner relies on selected excerpts from the Guidelines System manual for support of his erroneous conclusion that the tentative parole month is equivalent to the grid recommendation. Petitioner mistakenly misquotes to this Court Guidelines System Manual Chapter 8-27.01. Petitioner adds the words "from the Guidelines Grid" when quoting the policy statement to the Court. (Compare Petitioner's brief at pp. 5-6 with App. 107.)

These policy manual excerpts, do not support Petitioner's conclusions either that the tentative parole month automatically follows from the grid recommendation or that the Board created a promise of parole. Chapter 8-3.02 refers to the routing of the parole file to Board members for their determination as part of the guidelines system process. Chapters 8-26.01 and 8-27.01 define grid recommended months to serve which is the last step in the process by Board staff prior to routing the file for Board member vote. The Chapter defining a "tentative parole month," which was misquoted by Petitioner, expressly states that the tentative parole month calculation follows and directly relates to the Board's review and recommendation. Chapter 8-27.01. The tentative parole month is calculated from the "Board's tentative release decision."

Id. Thus, it is evident the tentative parole month is calculated from the Board's recommendation and not necessarily the grid recommendation. It follows from a proper reading of these provisions that the tentative parole month is not defined as an automatic computation from pre-determined elements, but instead results only after Board consideration of the guidelines grid and review of the individual circumstances in each offender's case.

The uncontradicted evidence is that this process was followed in Petitioner's case. The Board departed from the grid recommendation of ten months in Petitioner's case and recommended 61 months to serve or approximately five years of his fifteen-year sentence. The 61-month recommendation was added to his sentence computation date to determine tentative parole month of January, 1992. Petitioner was released on or about his tentative parole month.

Finally, Petitioner in his Statement of the Case attempts to mislead this Court by repeatedly describing alleged false information in his parole file. False information in Petitioner's parole file has never been an issue in this case. Nor was this issue preserved on appeal to the Eleventh Circuit. *See, e.g., Sultenfuss v. Snow,* 894 F.2d 1277 (11th Cir. 1990). The Board denies that there is any false or inaccurate information maintained in Petitioner's parole file. Moreover, the Board objects to any consideration of this allegation made for the first time on appeal. This is another example of Petitioner's efforts to confuse the simple question in this case: whether Petitioner had a reasonable expectation that he would be released according to the grid recommendation.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT.

The question presented in the instant petition is not novel. The Supreme Court on several occasions articulated the standard for determining when a state created a liberty interest. A liberty interest is created where (1) there are "substantive predicates to govern official decisionmaking" *and* (2) the "outcome to be reached upon a finding that the relevant criteria have been met" is "mandated." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). This Court "articulated a requirement . . . that the [provisions] contain 'explicitly mandatory language; i.e., specific directives to the decision maker that if the [provisions'] substantive predicates are present, a particular outcome *must* follow, in order to create a liberty interest." *Id.*, 490 U.S. at 463 (emphasis added). The application of this standard is not an exact science, as noted by the majority opinion below, but there are specific criteria which must be satisfied before due process is implicated.

The focus is correctly on the language of the provision in question. Before constitutional protections are invoked, there must be an articulated promise which legitimately raises the inmate's expectation. In *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979) this Court found an entitlement to parole release or expectation of liberty was created by the use of the words "*shall order his release.*" *Id.*, 442 U.S. at 11 (emphasis added). Release was an expressly promised result.

In *Hewitt v. Helms*, this Court found a promise of liberty was created due to "explicitly mandatory language" which commanded to the decision maker that if the "substantive predicates" are not met, then administrative confinement will not occur. *Hewitt v. Helms*, 459 U.S. 460 (1983). The *Hewitt* statute promised that "if no behavior violation has occurred," and "the security concern is abated," then "*the inmate must be released.*" *Hewitt*, 459 U.S. at 472 (emphasis added).

Again, this Court in *Board of Pardons v. Allen*, found that the relevant statute "use[d] mandatory ('shall') to 'create a presumption that parole release will be granted' when the designated findings are made." *Board of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987), quoting *Greenholtz, supra*. The *Allen* parole statute directed that the Board "*shall release on parole*" and "a prisoner *shall be placed on parole.*" *Allen*, 482 U.S. at 376 (emphasis added).

The mandatory explicit language, however, creates a promise of parole only if it is relevant. *Thompson*, 490 U.S. at 454. In *Thompson* this Court found that although factors limited the prison decision makers' discretion and the statute may have mandatory language, the regulations at issue "lack[ed] the requisite *relevant* mandatory language" promising a specific outcome. *Id.* at 464. In *Thompson*, the regulations regarding visitation mandated that specific factors must be considered in visitation decisions. The regulation stopped short, however, of requiring that a particular result be reached. The provision stated that once these factors are considered the visitor "*may be excluded.*" *Id.* at 456, n.1. (emphasis added). Absent a mandated guaranteed outcome, the prisoner

cannot reasonably form an objective entitlement to any interest.

In analyzing the provisions in the present case, the court below correctly determined that no express promise of release was stated in the Georgia parole system. There simply is no expressed promise of parole in the Georgia guidelines system which creates a reasonable expectation that the inmate shall be released.

Petitioner, like the Plaintiff in *Thompson*, attempts to point to an expectation of parole release not by showing any mandated outcome or express promise of release, but instead by focusing on "irrelevant" mandatory language. Petitioner points to language which states the Board "shall" adopt or use a guidelines system. The result of Petitioner's standard would require procedural due process whenever a state adopted a guideline system; a notion expressly rejected in *Greenholtz* and *Allen* which held that the adoption of a parole system alone does not implicate due process.

This Court warned in *Thompson* against hunting for irrelevant mandatory language stating:

> It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for any imperative that might be found. The search is for relevant mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question.

Id., 490 U.S. at 464, n.4. At page 21 of the Petition, Petitioner states that the Georgia statute through use of

the word "shall" mandates implementation of a parole guideline system, mandates that the system shall be used in determining parole actions and mandates specific factors which must be considered. Petitioner fails to mention any mandate of release or mandated liberty upon fulfillment of specific factors. There is no such mandate in the Georgia guidelines statute. Absent a promise of release there is no expectation of release.

Likewise there is no "relevant mandatory language" in the policy statements relied upon by Petitioner.[1] The provision relied upon most heavily is Guidelines System Manual Chapter 8-27.01, which defines for Board staff how to calculate a tentative parole month. The provision states:

> The tentative parole month, during which the offender may expect to be released, absent new information or other cause to cancel the Board's tentative release decision, shall be calculated by adding the recommended months to serve to the compute-from date of the controlling sentence.

Guidelines System Manual, Chapter 8-27.01.[2] The "expectation" described in this statement is merely a date which the Board and the inmate anticipate the inmate's release. It is in no sense a promise of parole since it can be changed at any time based on "new information" or for

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[1] The policy statements relied upon by Petitioner are continually objected to by the Board as these are not a part of the record.

[2] Recommended months to serve here is the recommendation made by the Board and not the grid recommendation. This provision was misquoted in Petitioner's brief by inserting the words "from the Guidelines Grid."

any "other cause" that the Board decides. This Court previously held that a tentative parole release date does not create a liberty interest. *Jago v. Vancuren*, 454 U.S. 14 (1981) (a promise to release date is insufficient to create a liberty interest). *See also Staton v. Wainwright*, 665 F.2d 686 (11th Cir. 1982) and *Inmates v. Ohio Parole Authority*, 929 F.2d 233 (6th Cir. 1991). Such an expectation, even if mutual, creates a mere hope of release and is not an entitlement. This policy statement does not amount to a promise of release on the tentative parole month.[3]

Petitioner also focuses on irrelevant "substantive predicates" in an effort to demonstrate a promise of parole. As *Thompson* explains, any state provision which is under scrutiny, usually has limits on discretion which appear to either narrow or broaden discretion, or both. These criteria for parole are referred to as substantive predicates. Lists of specific factors that must be considered for parole appear to limit discretion; while broad grants of discretion such as "release only if it would be compatible with the inmate's welfare or the welfare of society," appear to create unlimited discretion. O.C.G.A. § 42-9-42. This Court's precedent is clear, however, that

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[3] Petitioner's reliance on this policy statement further confuses the issues since even assuming that this statement created a promise of release at Petitioner's tentative parole month, it does not promise release on Petitioner's grid recommended months to serve. Petitioner *was* released on his tentative parole month. Petitioner's claim that he had an expectation to be released on his tentative parole month does not support his claim that he had an expectation to be released on the grid recommendation date which is actually what the Petitioner seeks in this case.

provisions may include detailed factors which limit discretion or broad grants of discretion; neither is conclusive as to whether due process is implicated. Compare *Allen* and *Greenholtz* (the presence of general criteria such as "parole shall be ordered only for the best interest of society" which provides broad discretion but does not deprive the prisoner of the liberty interest) with *Thompson* (presence of many specific factors which must be considered does not, standing alone, create a liberty interest.) This Court correctly avoids the gray area of deciphering just how many limitations are enough to create an expectation of release. Instead, this court requires a clear promise of liberty upon the satisfaction of factors before the Constitution is implicated.

The parole provisions here in issue have both broad grants of discretionary authority as well as lists of specific factors for consideration. Compare O.C.G.A. § 42-9-40 (specific factors the Board must consider) with O.C.G.A. § 42-9-42(c) (broad discretion to parole only if in the best interest of society). Petitioner contends that the broad grant of discretion in O.C.G.A. § 42-9-42 is consistent with a liberty interest in parole. This contention is correct. However, Petitioner ignores the converse which is also true; a liberty interest is not created simply because there are detailed factors which limit discretion. Petitioner's focus on the number of factors which must be considered under the Georgia guidelines system is misplaced. *Thompson, supra*. These limiting factors are irrelevant substantive predicates because satisfaction of the factors is not an express precondition for parole release. The degree or number of limitations on discretion is irrelevant because there is no required release upon the fulfillment

of these factors. Adopting Petitioner's position is tantamount to concluding that whenever a guidelines system (with detailed factors for consideration) is adopted, due process is automatically implicated. Again, this position was rejected by this Court. Despite detailed factors that must be considered, there still remains no reasonable expectation of parole upon the satisfaction of these factors.

The correct due process analysis leads to one controlling question: Where is the promise of release on parole that an inmate is entitled to expect under the Georgia parole guidelines? There is no such mandate. Like the provisions in *Thompson*, the Georgia parole guidelines system stops short of mandating release on parole.

II. THE DECISION BELOW IS CONSISTENT WITH LEGISLATIVE INTENT, GEORGIA SUPREME COURT PRECEDENT AND ADMINISTRATIVE INTERPRETATION.

A. Legislative Intent.

Contrary to Petitioner's contentions, the decision below is consistent with the legislative intent to preserve Board discretion. In support of his position that the Georgia legislature intended to remove Board discretion, Petitioner relies upon various newspaper articles including an article from Tennessee. Even assuming that these newspaper articles were a part of the record, which they are not, and that the articles had conclusive authority concerning legislative intent, which they do not, a close reading of the articles actually supports the Board's position that the guidelines were enacted as an aid to making

more soundly based decisions and not as a substitute for the decision-making process. For example, an article quoted at page 11 of Petitioner's brief states that the guidelines "will be implemented to help determine whether inmates in Georgia prisons ought to be paroled. . . . " Indeed, the Board's position is that the guidelines are helpful in their determination, but guidelines are not a substitute for the determination. Not a single article quoted by Petitioner states that the guidelines were intended to be a substitute for the Parole Board's discretion.

The application of rules of statutory construction disproves Petitioner's theory of legislative intent. It is axiomatic that the first rule of statutory interpretation requires a court to look only at the plain language of the statute for its meaning. *See, e.g., Ardestani v. I.N.S.*, 502 U.S. 129 (1991). Evidence outside the plain language is considered only if there is some ambiguity. *Id.* As discussed in the previous section, none of the plain language in the statute mandates release on parole. There is no need to look further than the plain language to discern legislative intent.

A second rule of statutory construction requires the court to presume that legislators are aware of pre-existing laws still in existence. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) and *Connecticut Nat. Bank v. Germain*, 503 U.S. 249 (1992). Newer statutes should be read consistently with pre-existing law. Already in existence at the time of the enactment of O.C.G.A. § 42-9-40 establishing the guidelines system, were the Georgia Constitution at Art. IV, Sec. II, Para. II and O.C.G.A. § 42-9-42. These provisions were not repealed by the guidelines statute.

The Constitution grants complete authority of executive clemency in the Parole Board. Likewise, O.C.G.A. § 42-9-42(c) provides a broad grant of discretionary power stating that the Board shall not parole an inmate unless his release will be compatible with his welfare and the welfare of society. Because neither of these provisions was repealed by the enactment of the guidelines statute, it may be presumed that the legislature did not intend for these broad grants of discretion to be replaced by the guidelines statute.

Moreover, if the guidelines statute were construed to limit Board discretion it would violate the Georgia Constitution. *See, e.g., Freeman v. The State*, 264 Ga. 27 (1994). The rules of statutory contruction require the courts to avoid this result if logically possible. *See, e.g., Chapman v. U.S.*, 500 U.S. 453 (1991) and *Walters v. Nat. Assn. of Radiation Survivors*, 468 U.S. 1323 (1984). The decision below correctly construed the guidelines statute consistent with the Georgia Constitution which presumably was the intent of the Georgia legislature.

B. Georgia Courts.

The decision below is also consistent with the decisions of Georgia's Supreme Court which hold that the Parole Board has constitutionally protected discretion in parole decisions. *See, e.g., Georgia State Board of Pardons and Paroles v. Turner*, 248 Ga. 767 (1982) (parole in Georgia is not mandated by rules or statutes and therefore the due process clause does not apply); and *Charron v. State Board of Pardons and Paroles*, 253 Ga. 274 (1984) (any legislation limiting the Board's constitutionally conferred power of

executive clemency is unconstitutional). As recently as 1994, Georgia Supreme Court discussed the Board's absolute constitutionally conferred discretionary power of parole which may not be legislatively infringed. *Freeman v. The State,* 264 Ga. 27 (1994). The Eleventh Circuit's decision is the only possible decision consistent with this state's interpretation of the Board's authority.

C. Administrative Interpretation.

Deference should be given to an agency's understanding of how it is required to operate. *See, e.g., Department of Treasury v. Federal Labor Relations Authority,* 494 U.S. 922 (1990) (great deference should be given to an administrative agency's interpretation of its statute). Georgia regulations unambiguously state the agency's interpretation. The Board interprets the guidelines statute as creating no promise of parole. The agency's regulation states:

> The parole decision guidelines system is an aid to the Board in making more consistent, soundly based and explainable parole decisions and does not create a liberty interest. The Board specifically reserves the right to exercise its discretion under Georgia law. . . .

Ga. Comp. R. & Regs. r. 475-3-.05(5). This is a clear statement of the Parole Board's interpretation of its state regulation. The court's decision below properly gives deference to the Board's interpretation.

III. THE DECISION BELOW IS CONSISTENT WITH THE SUPREME COURT'S EQUITABLE CONSIDERATIONS.

Petitioner contends it is "inconceivable" that the Board could adopt guidelines and then elect to depart from the grid recommendation thereby "ignoring" its own system. A review of various guidelines systems demonstrates that it is common to reserve discretionary power to depart from the grid recommendation whether or not due process is implicated. *See, e.g.*, 18 U.S.C. § 4206 (federal parole guidelines must be adopted but the Commission is authorized to depart from them if it "determines there is good cause for doing so.")

The Georgia guidelines system is an attempt to create equality throughout the state both in sentencing and time to serve. Guidelines System Manual Chapter 8-1.02. While a system of factors creating a formula for predicting parole success is an applaudable goal, such will never be completely obtained. Human circumstances are too varied to be able to mathematically compute justice. The system does provide, however, a rational basis for thoughtful consideration of parole decisions in an attempt to treat similar persons alike.

This Court recognizes the injustice of burdening a parole board with additional procedural requirements where it has made attempts to create a fairer decision-making process. This Court stated in *Greenholtz*:

> No ideal, error-free way to make parole-released decisions has been developed; the whole question has been and will continue to be the subject

> of experimentation. . . . Our system of federalism encourages this state experimentation. If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole.

Greenholtz, 442 U.S. at 14. The burdens of procedural due process do not attach simply because a state has adopted a parole system. There is only a need for procedural protections where an inmate is provided a clearly expressed promise of release. In the instant case, Petitioner fails to point to any expressed promise which formed an expectation of release, and, indeed, no such promise or expectation exists. Thus, the burdens of due process simply do not attach so as to require additional procedures when the Parole Board departs from the mechanical recommendation of the parole guidelines.

CONCLUSION

Respondents request that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

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STATE BOARD OF PARDONS AND PAROLES – PAROLE GUIDELINES.

No. 879 (Senate Bill No. 521).

AN ACT

To amend an Act creating the State Board of Pardons and Paroles, approved February 5, 1943 (Ga. Laws 1943, p. 185), as amended, so as to require the Board to adopt, implement and maintain a parole guidelines system for determining parole action; to provide for other matters relative thereto; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. An Act creating the State Board of Pardons and Paroles, approved February 5, 1943 (Ga. Laws 1943, p. 185), as amended, is hereby amended by adding a new section between Sections 12 and 13, to be designated Section 12A, to read as follows:

"Section 12A. (a) The Board shall adopt, implement and maintain a parole guidelines system for determining parole action. Such guidelines system shall be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system shall be consistent with the Board's primary goal of protecting society and shall consider the severity of the current offense, the prisoner's prior criminal history, prison conduct and social factors which the Board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.

(b) The guidelines system required by subsection (a) hereof shall be adopted by rules or regulations of the Board. Such rules or regulations shall be adopted in conformity with the Act known as the 'Georgia Administrative Procedure Act,' approved March 10, 1964 (Ga. Laws 1964, p. 338), as amended."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 20, 1980.